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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN CARLO, INC.,

Petitioner,

v.

SECRETARY OF LABOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

STUART C. MARKMAN
KYNES, MARKMAN & FELMAN, P.A.
Post Office Box 3396
Tampa, FL 33601
Phone: (813) 229-1118

MICHAEL S. FINCH
1401 61st Street South
Gulfport, FL 33704
Phone: (727) 562-7862

GEORGE E. SPOFFORD, IV
Counsel of Record
AARON W. PROULX
GLENN RASMUSSEN FOGARTY & HOOKER, P.A.
Post Office Box 3333
Tampa, FL 33601
Phone: (813) 229-3333

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Under 29 U.S.C. Section 666, an employer may be penalized for a violation of the Occupational Safety & Health Act of 1970 only if the Secretary of Labor proves the employer had knowledge of the violation. Can the Secretary establish knowledge by imputing to the employer as a matter of law the knowledge of a supervisor who intentionally violates the Act and the employer's work rules without proving the supervisor's misconduct was foreseeable to the employer?

RULE 14.1(b) STATEMENT AND CORPORATE DISCLOSURE STATEMENT

A list of all parties to the proceedings in the court whose judgment is the subject of this Petition is as follows:

All parties appear in the caption of the case on the cover page.

Corporate disclosure statement:

John Carlo, Inc. – There are no companies that own any part of John Carlo, Inc.

Carlo Environmental Technologies, Inc. – 100% owned by John Carlo, Inc.

Southern Pavements, LLC – 100% owned by John Carlo, Inc.

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PETITION FOR A WRIT OF CERTIORARI

John Carlo, Inc. ("Petitioner") respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Opinion of the U.S. Court of Appeals for the Eleventh Circuit is officially reported at 21 O.S.H. Cas. (BNA) 2010, unofficially reported at 2007 WL 1394632, and reproduced in the Appendix at App. 1-5.

The Decision and Order of the ALJ, dated May 11, 2006, is officially reported at 2005 O.S.H.D. (CCH) P 32834, unofficially reported at 2006 WL 2037376, and reproduced in the Appendix at App. 6-43.

The Final Order of the Commission, dated June 26, 2006, is not reported. It is reproduced in the Appendix at App. 44-45.

The Order of the U.S. Court of Appeals for the Eleventh Circuit, dated August 7, 2007, denying Petitioner's Petition for Rehearing en banc, is not reported. It is reproduced in the Appendix at App. 46-47.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2007. A petition for rehearing en banc was denied on August 7, 2007. This Petition is timely under 28 U.S.C. §§ 1254(1), 2101(c), and Supreme Court Rule 13.3.

STATUTORY PROVISIONS INVOLVED

This case involves a finding of a violation of the Occupational Safety and Health Act of 1970 ("Act"), 29 U.S.C. § 651 *et seq.*, through a violation of Chapter 29 of the Code of Federal Regulations ("OSHA standards"). Relevant provisions of the Act and OSHA standards are reprinted in the Appendix at App. 48-54 and 55-63, respectively.

STATEMENT OF THE CASE

Petitioner is a corporation engaged in the installation of sewer and water lines. It employs more than 1000 employees who work at numerous construction sites. In 2004, Petitioner was cited for violating OSHA standards after one of its employees was killed in a trench cave-in. The cave-in would not have occurred had Petitioner employed certain safety measures required by OSHA standards and by the employer's own work rules. *See* App. 9, 14, 21-23. The decision not to employ those safety measures was made unilaterally by a project superintendent. *See*

App. 9, 17-23. A job foreman followed the superintendent's decision without consulting with the superintendent's "superiors." *See* App. 9, 22. When the superintendent and foreman (collectively "supervisors") ordered two employees to work in the unsafe trench, they "decided to take a chance based on expediency. [They] gambled [they] could get in, lay the pipe and get out without a cave-in." App. 31.

Petitioner's general superintendent and other senior management did not learn of the supervisors' misconduct until after the accident had already occurred. *See* App. 22, 40-41. There is no evidence that a similar violation had ever previously occurred at any of Petitioner's work projects.

Petitioner agreed that the trench conditions giving rise to this case violated OSHA standards designed to protect employees from cave-ins. *See* App. 8, 13; 29 C.F.R. § 926.652(a)(1). But Petitioner pointed out it could not foresee that its supervisors would deliberately order employees to work in the unsafe trench knowing their order was unlawful. *See* Petition for Discretionary Review at 3-6.

The administrative law judge found that the supervisors knowingly and deliberately ignored relevant OSHA standards by intentionally directing the excavation of the violative trench. *See* App. 14, 20, 29. He then invoked agency principles to impute to Petitioner as a matter of law the supervisors' knowledge of their own misconduct. *See* App. 14, 15, 29. The ALJ stated that "to understand the state of mind of a

corporation, the state of mind of its agents acting on its behalf must be determined." App. 15. According to the ALJ, because Petitioner was "a corporation which acted through its agents," Petitioner "had knowledge of the violative conditions."[1] App. 14, 29. The ALJ also rejected Petitioner's affirmative defense that the supervisors had engaged in unpreventable employee misconduct. *See* App. 32-41. He concluded that Petitioner committed a serious and willful violation of 29 C.F.R. § 125.652(a)(1), and assessed Petitioner a penalty of $50,000. *See* App. 14-15, 31-32, 41-42. The Occupational Safety and Health Review Commission ("Commission") adopted the ALJ's decision. *See* App. 1-2.

On appeal to the Eleventh Circuit, Petitioner argued that by imputing the supervisors' knowledge of their own misconduct to Petitioner, the Commission relieved the Secretary of Labor ("Secretary") of the burden of proving a core element of the prima facie case – that the supervisors' misconduct was foreseeable to Petitioner. *See* Initial Brief at 20, 25.

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[1] Before he issued his decision in this case, the same administrative law judge issued a decision in *OSHRC v. W.G. Yates & Sons Constr. Co., Inc.*, 21 O.S.H. Cas. (BNA) 1171 (Jan. 31, 2005), App. 64-83, a case that was eventually reviewed by the Fifth Circuit. In his order in *W.G. Yates*, the ALJ used the same knowledge-imputation analysis he employed here. App. 68-69. As explained in Part B, the fact that the Fifth Circuit *rejected* that knowledge-imputation analysis in *W.G. Yates* while the Eleventh Circuit has *endorsed* it here highlights the confusion in the law stemming from the conflict in the circuits.

Although its own precedent prohibited imputing to the employer the supervisors' knowledge of their own misconduct,[2] the Eleventh Circuit affirmed the Commission and expressly endorsed its knowledge-imputation analysis. *See* App. 4-5. The Court held that "the ALJ properly *imputed* [the supervisors'] actual knowledge of the violation to [Petitioner]." *See* App. 4 (emphasis added). It stated that the "[supervisors] 'knowingly and deliberately' violated the standard," and "[Petitioner] 'through [the supervisors], was actually aware, at the time of the violative act, that the act was unlawful.'" App. 4. Because the Commission and the Eleventh Circuit imputed the supervisors' knowledge of their own misconduct to Petitioner, neither the Commission nor the Eleventh Circuit required the Secretary to prove that the supervisors' misconduct was foreseeable to Petitioner.

REASONS FOR GRANTING THE PETITION

When it approved the Commission's decision, the Eleventh Circuit adopted the approach followed by only one other circuit in cases involving supervisory

[2] *See Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 567-68, 570-71 (5th Cir. 1976) ("it was error to find [the employer] liable on an imputation theory"). *Horne* is binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (adopting as binding precedent the decisions of the former Fifth Circuit issued before October 1, 1981).

misconduct.[3] Under that approach, a supervisor's knowledge that he is violating OSHA standards and the employer's work rules is imputed to the employer regardless of whether the employer could have foreseen the supervisor's misconduct. As explained below, the Eleventh Circuit's decision contributes to the "confusing patchwork of conflicting approaches" on the fundamental questions oncerning the burden of proof in enforcement proceedings under the Act. *See L.E. Myers Co. v. Sec'y of Labor*, 484 U.S. 989, 989 (1987) (White & O'Connor, JJ., dissenting from denial of certiorari).

This case provides the Court an opportunity to resolve a conflict concerning the important question of whether knowledge-imputation should be permitted in supervisory misconduct cases. The Court should review this case because the Eleventh Circuit opinion (1) conflicts with the majority of circuit court opinions addressing the issue; (2) contradicts Congress' express intent to create a fault-based rather than strict liability scheme; and (3) perpetuates confusion and inconsistency, and promotes forum shopping.

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[3] As used in this Petition, "supervisory misconduct cases" describes cases like this one, in which a supervisor's *own* act violates both OSHA Standards *and* the employer's work rules.

A. The Eleventh Circuit's opinion conflicts with the majority of circuit court opinions that have addressed the question whether a supervisor's knowledge of his own misconduct can be imputed to the employer.

Under the Occupational Safety and Health Act (the "Act"), Congress created a fault-based rather than strict liability scheme of employer liability. *See* 29 U.S.C. § 651(b); *W.G. Yates & Sons Constr. Co., Inc. v. OSHRC*, 459 F.3d 604, 606-07 (5th Cir. 2006); *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 568 (5th Cir. 1976) ("Congress quite clearly did not intend . . . to impose strict liability: The duty was to be an achievable one. . . . Congress intended to require elimination only of preventable hazards."). Accordingly, the Secretary of Labor bears the burden of proving by a preponderance of the evidence that an employer has violated the Act and OSHA standards. *See* 29 U.S.C. § 659(c); 5 U.S.C. § 556(d); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 275-76 (1994).[4] Employer knowledge of a violation is "a fundamental element of the Secretary of Labor's burden of proof." *Trinity Indus., Inc. v. OSHRC,* 206 F.3d 539, 542 (5th Cir. 2000).

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[4] The Commission has held that to prove a prima facie case, the Secretary must show: (1) a relevant safety standard applies, (2) the employer failed to comply with it, (3) employees had access to the violative condition, and (4) the employer had knowledge or constructive knowledge of the condition. *See New York State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 105 (2d Cir. 1996).

In this case, the ALJ found Petitioner committed a serious violation of OSHA standards under section 666(k) of the Act. A violation is serious if

> there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in [the] place of employment *unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.*

29 U.S.C. § 666(k) (emphasis added). Thus, to establish a serious violation, the Secretary must prove that the employer had actual or constructive knowledge of the violation. An employer has constructive knowledge if a violation is foreseeable. Whether a violation is foreseeable requires analysis of an employer's safety policy, training, and discipline. *See W.G. Yates*, 459 F.3d at 608-09 (citing *Horne*, 528 F.2d at 569). If an employer's safety training and supervision are inadequate, the law deems a violation to be foreseeable. *See Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 358 (3d Cir. 1984); *Capital Elec. Line Builders of Kansas, Inc. v. Marshall*, 678 F.2d 128, 130 (10th Cir. 1982); *Horne*, 528 F.2d at 569.

The circuits are in conflict as to whether the Secretary can satisfy its burden of establishing the employer's knowledge simply by imputing to the employer a supervisor's knowledge of his own misconduct. This prominent conflict is discussed in

numerous circuit court opinions. *See, e.g., W.G. Yates,* 459 F.3d at 607-08 ("The disagreement [among the circuit courts] arises . . . in determining whether the government can establish an employer's knowledge of a violation of law based on a disobedient supervisor's misconduct."); *New York State Elec. & Gas Corp. v. Sec'y of Labor,* 88 F.3d 98, 106-08 (2d Cir. 1996); *Pennsylvania Power*, 737 F.2d at 358 & n.9. The circuit conflict also has been addressed by numerous commentators. *See, e.g.,* Heather Malone Garrison, *Confusion Reigns Supreme: The United States Supreme Court's Refusal to Grant Certiorari in L.R. Willson and Sons, Inc. v. OSHRC Perpetuates the Split Among Circuits in OSHA Employee Misconduct Cases*, 101 W. Va. L.Rev. 475, 485-94 (1998); Kenneth D. Kleinman and John F. Ward, *The Intersection of Employer and Employee Responsibility: The Burdens of Showing Employer Knowledge and Employee Misconduct*, 7 U. Pa. J. Lab. & Emp. L. 487, 497-510 (2005).

1. The majority view correctly requires the Secretary of Labor to prove an OSHA violation was foreseeable to the employer and rejects imputation of a supervisor's knowledge of his own misconduct.

In conflict with the decision on review, the Third, Fourth, Fifth, and Tenth Circuits expressly prohibit knowledge imputation in supervisory misconduct cases. *See Pennsylvania Power,* 737 F.2d at 357-58; *L.R. Willson & Sons, Inc. v. OSHRC*, 134 F.3d 1235,

1240 (4th Cir. 1998); *W.G. Yates*, 459 F.3d at 608-09; *Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980). The First Circuit has also expressed misgivings about imputing supervisory knowledge in such cases. *See Central Soya de Puerto Rico, Inc. v. Sec'y of Labor*, 653 F.2d 38, 39-40 (1st Cir. 1981) ("This is not to hold that an employer is necessarily to be held responsible for actions of its supervisors taken contrary to the employer's instructions or safety regulations, or which are otherwise unforeseeable.").

The majority approach honors Congress' intent. It requires the Secretary to bear the burden of proving every element of the case, including employer knowledge. *See Pennsylvania Power,* 737 F.2d at 354, 357; *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396, 401 (4th Cir. 1979); *W.G. Yates*, 459 F.3d at 607, 609; *Horne*, 528 F.2d at 570; *Mountain States,* 623 F.2d at 158. Under the majority view, the Secretary cannot prove employer knowledge in supervisory misconduct cases unless the Secretary shows the violation was foreseeable to the employer as required by section 666(k). *See W.G. Yates*, 459 F.3d at 607, 609 ("Yates can be charged with knowledge only if Olvera's knowledge of his own misconduct is imputable to Yates. The knowledge is imputed only if Olvera's conduct was foreseeable."); *Pennsylvania Power,* 737 F.2d at 354-55, 357-58; *Ocean Electric*, 594 F.2d at

401; *Horne*, 528 F.2d at 570-71; *Mountain States,* 623 F.2d at 158.[5]

The majority approach is the superior approach for a number of reasons, all of which flow directly from the language and purpose of the Act itself. First, imputing knowledge in a supervisory misconduct case impermissibly shifts the burden of proof on the critical element of foreseeability. As explained in *Mountain States*:

> [The supervisor] knew he personally violated the safety standards, of course; if we impute that knowledge to the employer and declare that now the employer must show the noncomplying conduct was unforeseeable we are shifting the burden of proof to the employer. All the Secretary would have to show is the violation; the employer then would carry the burden of nonpersuasion.

623 F.2d at 158. *See also W.G. Yates*, 459 F.3d at 609 & n.8 ("By failing to conduct the foreseeability analysis before imputing [the supervisor's] knowledge, the ALJ effectively relieved the government of its burden of proof to establish a violation of the Act and placed

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[5] The Secretary contended below that Petitioner waived its argument that the Secretary was required to prove foreseeability as part of the prima facie case. According to the Commission, Petitioner argued foreseeability before the Commission only as an aspect of its affirmative defense. Petitioner's request for review by the Commission refutes the Commission's characterization. In that request, Petitioner argued, *inter alia*, "as a matter of law, Complainant has the burden of proving that JCI had actual or constructive knowledge of the unsafe trench." Petition for Discretionary Review at 3-4.

on [the employer] the burden of defending a violation that had not been established."); *Pennsylvania Power*, 737 F.2d at 357-58 ("[T]he Secretary may not shift to the employer the ultimate risk of non-persuasion in a case where the inference of employer knowledge is raised only by proof of a supervisor's misconduct.").

Second, imputing knowledge in a supervisory misconduct case is irreconcilable with Congress' rejection of the imposition of strict liability in cases arising under the Act. *See* 29 U.S.C. § 651(b). As explained in *W.G. Yates*:

> Congress quite clearly did not intend . . . to impose strict liability: The duty was to be an achievable one. . . . Congress intended to require elimination only of preventable hazards. . . . [I]mputing to the employer the knowledge of a supervisor of his own violative conduct without any further inquiry would amount[] to the imposition of a strict liability standard, which the Act neither authorizes nor intends.

459 F.3d at 606, 607 (internal citations omitted). *See also Pennsylvania Power*, 737 F.2d at 354; *Ocean Electric*, 594 F.2d at 399; *Horne*, 528 F.2d at 570-71.

Third, imputing knowledge in a supervisory misconduct case defeats a primary goal of the Act. The first means listed by Congress for achieving the Act's goal of assuring safe and healthful working conditions is to stimulate "employers . . . to institute new and to perfect existing programs for providing safe and healthful working conditions." *See* 29 U.S.C.

§ 651(b)(1). Imputing a supervisor's knowledge of his own misconduct undermines this remedial purpose. If employers are held liable for all supervisory violations regardless of their efforts to prevent them, they will be far less motivated to implement safety programs. As the Fourth Circuit stated,

> imputation of a supervisor's acts to the company in each instance would frustrate the goals behind the Act. . . . 'Such a holding would also not tend to promote the achievement of safer workplaces. If employers are told that they are liable for violations regardless of the degree of their efforts to comply, it can only tend to discourage such efforts.'

Ocean Electric, 594 F.2d at 399 (internal citations omitted). *See also Pennsylvania Power*, 737 F.2d at 354.

2. The minority view incorrectly imputes a supervisor's knowledge of his own misconduct regardless of whether the misconduct was foreseeable to the employer.

As noted, the minority approach followed by the Sixth Circuit and now adopted by the Eleventh Circuit imputes to the employer a supervisor's knowledge of his own misconduct. *Danis-Shook Joint Venture XXV v. Sec'y of Labor*, 319 F.3d 805, 812 (6th Cir. 2003); *John Carlo, Inc. v. Sec'y of Labor*, 234 Fed. Appx. 902, 2007 WL 1394632 (11th Cir. 2007), App. 4-5. Circuit courts following that approach have not offered reasons for doing so.

It appears that the minority approach is based on an uncritical application of general principles of agency law. Most courts agree that agency principles may be used to impute a supervisor's knowledge that a *subordinate* employee has violated OSHA standards. *See Mountain States*, 623 F.2d at 158 ("When a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge actual or constructive of noncomplying conduct of a subordinate."). But when the *supervisor himself* engages in misconduct, only the majority approach is faithful to the Act's fault-based liability scheme. The conflict in the courts of appeals should be resolved in favor of the majority rule.

3. The minority view results in a de facto policy of strict liability in supervisory misconduct cases.

The minority approach is derived from the Commission's own policy concerning supervisory misconduct. The Commission has long pursued a de facto policy of strict liability in supervisory misconduct cases that is at odds with Congress' intent to create a fault-based liability scheme. *See generally* Kleinman & Ward, *supra* 9, at 487-89, 493-97, 509-10. The de facto policy results from the Commission's view that when a supervisor violates an OSHA standard his knowledge is imputed so that the prima facie case automatically is established, and the employer's

"unpreventable employee misconduct" affirmative defense is virtually unprovable.

In supervisory misconduct cases, the Commission deems the Secretary's prima facie case automatically established: "[W]hen a violation is committed by an employer's *supervisory* employee, the actions and knowledge of that employee are *imputed* to the employer unless the employer rebuts by demonstrating that the supervisor's conduct was unpreventable." *Sec'y of Labor v. Pennsylvania Power & Light Co.*, 1983-1984 O.S.H.D. (CCH) P 26518, *6 (OSHRC Apr. 8, 1983) (emphasis added) (reversed in *Pennsylvania Power*, 737 F.2d at 360); *see also Sec'y of Labor v. CBI Servs., Inc.*, 201 O.S.H.D. (CCH) P 32473, *13 (OSHRC Oct. 29, 2001) (expressing the Commission's knowledge-imputation policy, which by then had been rejected by three circuit courts).

With the Secretary's prima facie case already in place, the employer ostensibly can avoid liability by showing that the supervisory misconduct was unpreventable. *See Daniel Int'l Corp. v. OSHRC*, 683 F.2d 361, 364 (11th Cir. 1982). Under that defense, the *employer* has the burden of proving each of four elements. The employer must prove that it has: (1) established work rules designed to prevent the violation, (2) adequately communicated those rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered. *See id.*; *W.G. Yates*, 459 F.3d at 609 n.7.

The affirmative defense applies to subordinate and supervisory misconduct alike. The problem is that in *supervisory* misconduct cases, the defense is largely illusory. The Commission's view is that "[w]here a supervisory employee is involved, the proof of unpreventable employee misconduct is *more rigorous* and the defense is more difficult to establish." *Sec'y of Labor v. Archer-Western Contractors, Ltd.*, 1991 O.S.H.D. (CCH) P 29317, *5 (OSHRC Apr. 30, 1991) (emphasis added). In addition, the Commission views evidence of supervisory misconduct, in and of itself, as "*strong* evidence that the employer's safety program was lax." *Id.* (emphasis added). *See also Daniel*, 683 F.2d at 365. Under the Commission's four-part test, if the employer's safety program is lax, the affirmative defense is defeated. *Daniel*, 683 F.2d at 364.

The Commission's policy requiring that employers prove each element of the four-part defense, insisting on "more rigorous" proof in supervisory misconduct cases, and viewing supervisory misconduct itself as "strong evidence" of a lax program, is virtually dispositive of an employer's affirmative defense. The very fact that supervisory misconduct has occurred means the affirmative defense usually is ineffective. *See, e.g. W.G. Yates*, App. 73-81.[6]

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[6] The dissent in *W.G. Yates* argued that knowledge-imputation in the prima facie case does not amount to strict liability because the employer still may raise the affirmative defense. *See W.G. Yates*, 459 F.3d at 610 (Reavley, C.J., dissenting). The dissent did not recognize the impact of Commission precedent interpreting that defense.

The Eleventh Circuit followed the Commission's policy of strict liability in this case. When it imputed the supervisors' knowledge of their own misconduct to Petitioner as a matter of law, the Eleventh Circuit relieved the Secretary of its burden to prove that the violation was foreseeable. That shifted to Petitioner the burden to prove its affirmative defense that the violation was *not* preventable.

Because the ALJ followed the Commission's policy, the affirmative defense was dead on arrival. *See* App. 39-41. Applying the *Archer-Western* "more rigorous" standard, the ALJ in this case found that Petitioner failed to establish work rules "designed to prevent" the violation because Petitioner's rules inaccurately stated the degree of sloping required for the trench (34 degrees versus 45 degrees) as well as the minimum height required for "trench boxes" (12 inches versus 18 inches). *See* App. 35-36. Yet the violation resulted not from the supervisors' reliance on technical inaccuracies in Petitioner's rules; rather, it resulted from the supervisors' decision to ignore Petitioner's safety rules altogether. *See* App. 9, 21-23. Again following *Archer-Western*, the ALJ also found that the supervisors' "involvement in the decision to allow employees to work in this unprotected trench is *strong* evidence that [Petitioner's] enforcement of its safety program and rules was lax." App. 41 (emphasis added). As a result, Petitioner had no chance of establishing its affirmative defense.

The combination of imputed supervisory knowledge with an illusory affirmative defense adds up to strict liability. The Commission's policy, like the

minority view it spawned, is irreconcilable with Congress' intent to create a fair, fault-based scheme.[7]

B. The Eleventh Circuit's Opinion perpetuates confusion and inconsistency, and promotes forum shopping.

The issue raised in this Petition is of critical importance. Questions bearing on the burden of proving employer knowledge in OSHA cases are "central to OSHA's enforcement efforts" under the Act. *See L.E. Myers Co.*, 484 U.S. at 989 (White & O'Connor, JJ., dissenting from denial of certiorari). *See also Lavine v. Milne*, 424 U.S. 577, 585 (1976) ("[w]here the burden of proof lies on a given issue is, of course rarely without consequence and frequently may be dispositive"). The conflicting approaches the circuits have followed in connection with the burden of proof has created uncertainty and undermined the

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[7] The Eleventh Circuit's failure to comply with Congress' intent is at odds with its own precedent. In 1976, the Fifth Circuit held in *Horne* that the Commission cannot invoke agency principles to impute a supervisor's knowledge to an employer because the Secretary has the burden to prove foreseeability under Section 666(k). *See Horne,* 528 F.2d at 567-68, 570-71. The Court explained that "a contrary holding would . . . result in the imposition of . . . strict or absolute liability, which Congress, through [Section 666(k)], specifically eschewed." *Id.* at 571. In this case, the ALJ made the same error that required reversal in *Horne*. *See* App. 14, 15, 29. Notwithstanding the fact that *Horne* is binding precedent in the Eleventh Circuit, *see* n.2, *supra*, the Eleventh Circuit affirmed.

uniformity needed when applying the Act to employers across the nation.[8]

The issue presented in this Petition recurs frequently. In fact, it arises every time an alleged violation of the Act is based on supervisory misconduct. This case vividly illustrates the conflict and confusion that the issue has caused. The ALJ who ruled against Petitioner in this case is the same ALJ who, just seventeen months earlier, used the same knowledge-imputation analysis to rule against the employer in *W.G. Yates*. *See* App. 14, 15, 29; *W.G. Yates*, 459 F.2d at 605-07, 609. The Fifth Circuit *rejected* the ALJ's analysis. *See W.G. Yates*, 459 F.2d at 607-10 (remanding and requiring the ALJ to conduct the foreseeability analysis of the prima facie case). The Eleventh Circuit *endorsed* it. *See* App. 4-5.

In its present conflicted state, the law strongly encourages forum shopping. An aggrieved employer may generally seek review of a Commission decision in any of three circuits – where the violation occurred, where the employer is headquartered, or in the District of Columbia. *See* 29 U.S.C. § 660(a). Similarly, the Secretary may seek

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[8] The Commission perpetuates the conflict by seeking to avoid its resolution. When the Commission anticipates that its decision will be appealed to a circuit rejecting its imputed-knowledge policy, it defers to that circuit's interpretation of the Act. *See Sec'y of Labor v. Kerns Bros. Tree Serv.*, 2000 O.S.H.D. (CCH) P 32053, *4 (OSHRC Mar. 16, 2000) ("Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case – even though it may differ from the commission's precedent.").

review in the circuit where the violation occurred or where the employer is headquartered. *See* 29 U.S.C. § 660(b). Given the current conflict in the circuit courts, employers and the Secretary have strong incentive to select an appellate forum that follows a favorable approach to supervisory misconduct cases. The nation's employers, at the same time, must live with uncertainty regarding their responsibility for the conduct of company supervisors.

CONCLUSION

The Eleventh Circuit's opinion (1) conflicts with the majority of circuit court opinions that have addressed the issue of supervisory misconduct in OSHA cases; (2) violates Congress' express intent to create a fault-based rather than strict liability scheme of employer liability under OSHA; and (3) perpetuates a confusing and inconsistently applied scheme that promotes forum shopping. The question presented by this Petition should be reviewed and resolved by the Supreme Court.

Respectfully submitted,

STUART C. MARKMAN
KYNES, MARKMAN & FELMAN, P.A.
Post Office Box 3396
Tampa, FL 33601
Phone: (813) 229-1118

MICHAEL S. FINCH
1401 61st Street South
Gulfport, FL 33704
Phone: (727) 562-7862

GEORGE E. SPOFFORD, IV
Counsel of Record
AARON W. PROULX
GLENN RASMUSSEN FOGARTY & HOOKER, P.A.
Post Office Box 3333
Tampa, FL 33601
Phone: (813) 229-3333

Attorneys for Petitioner

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14425

OSHRC No. 04-1405

JOHN CARLO, INC.,

Petitioner,

versus

SECRETARY OF LABOR,

Respondent.

Petition for Review of a Decision of the
Occupational Safety & Health Review Commission

(May 14, 2007)

Before CARNES, WILSON and HILL, Circuit Judges.

PER CURIAM:

John Carlo, Inc. ("JCI") seeks review of a final order of the Occupational Safety and Health Review Commission in favor of the Secretary of Labor. After a trench collapse fatally injured a JCI employee, the Administrative Law Judge ("ALJ") found that JCI willfully violated 29 C.F.R. § 1926.652(a)(1) and assessed a $50,000 penalty. The Commission adopted

the decision of the ALJ, which became the final order of the Commission. JCI argues that the Secretary failed to establish a violation before the ALJ and asks us to reverse the Commission's final order. We find that substantial evidence supports the ALJ's decision. Accordingly, we affirm.

JCI participated in a road improvement project in Jacksonville, Florida, which required crew members to install a sewer line down the middle of an existing roadway. At one location, the new line would cross under an existing gas line that was perpendicular to the proposed sewer line. Running parallel to the proposed sewer line were buried gas, water, and telephone lines. JCI supervisors began discussing the potential problems posed by the other utility lines, specifically the perpendicular gas line, months in advance of actually encountering those lines in the excavation. JCI attempted to have the gas company relocate the perpendicular gas line, but the company would not cooperate. JCI's supervisors resolved to address the problem of the perpendicular gas line when they encountered it.

OSHA regulations require employers to protect employees working in excavations from cave-ins with an adequate protection system. 29 C.F.R. § 1926.652(a)(1). There are various types of protection systems including sloping and shoring. On March 30, 2004, the JCI crew worked in two stacked trench boxes laying pipe up to the location where the gas line crossed the trench for the sewer line. On March 31, 2004, however, the crew removed the top trench

box because both boxes could not fit under the perpendicular gas line.

The crew pulled the bottom box under the perpendicular gas line and prepared the bottom of the trench to lay one joint of the sewer pipe. Two crew members entered the trench and worked inside the trench box for at least 20-30 minutes. The trench walls above the box (approximately six feet) were not sloped or otherwise protected, which undisputedly violated OSHA standards. While the two employees were in the trench, a large clay ball dislodged, fell into the trench, and struck one employee who eventually died as a result. Subsequent to the cave-in, JCI was able to slope the trench walls according to OSHA standards and complete the laying of the pipe at the same location without moving or removing the gas line.

After hearing testimony from the project superintendent (Lester Cox), the foreman (James Jacobs), and the employee who survived the accident, the ALJ concluded that Cox instructed Jacobs to use only the bottom trench box where the trench crossed under the gas line. Jacobs testified that he reminded Cox that this would leave the top portion of the trench unprotected. Jacobs said Cox explained that he realized the problem, but because JCI had bid the project based on six-foot-wide trenches, they could not slope the trench. Jacobs was present and supervised the crew at the time of the accident.

The ALJ imputed Jacobs' actual knowledge of the violation to JCI. The ALJ determined that, in light of the employee's death and the nature of the hazard, the "violation was a serious violation in that there was a substantial probability that death or serious physical harm could result from the violative conditions." The ALJ also determined that the violation was willful and held that JCI, "through Cox and Jacobs, was actually aware, at the time of the violative act, that the act was unlawful." Both Cox and Jacobs "knowingly and deliberately" violated the standard because it "was more expedient to place employees in an unprotected trench for 15 minutes to lay one joint of pipe than to take the time to adequately shore or slope the trench to protect employees."

The ALJ also rejected JCI's assertion that the misconduct of Cox and Jacobs was unpreventable. Jacobs had followed the directions of Cox, JCI's highest-ranking supervisor on the project. Moreover, the ALJ found that JCI's written safety program had "material errors as to OSHA's trenching requirements regarding the appropriate degree of sloping . . . and the minimum height of a trench box above surrounding soil," as well as seven other errors. Yet JCI did not "correct these obvious errors or communicate the correct information to employees on this project prior to the accident." Thus, JCI "failed to establish specific work rules designed to prevent this violation" and "eliminate employee exposure to the hazard covered by the standard." In addition, the ALJ found that JCI

had inadequately trained Jacobs, Cox, and other employees and ineffectively enforced its safety program.

The Commission's decision is "entitled to considerable deference on appellate review." *Fluor Daniel v. Occupational Safety & Health Review Comm'n,* 295 F.3d 1232, 1236 (11th Cir. 2002). "We review the Commission's findings of fact to determine whether they are supported by substantial evidence on the record as a whole; if so, they are deemed conclusive." *J.A.M. Builders, Inc. v. Herman,* 233 F.3d 1350, 1352 (11th Cir. 2000). Substantial evidence is "something more than a scintilla of evidence, but something less than the weight of the evidence" and is enough relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *McHenry v. Bond,* 668 F.2d 1185, 1190 (11th Cir. 1982). Moreover, we must uphold the Commission's legal determinations unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Fluor Daniel,* 295 F.3d at 1236.

After carefully considering the briefs, reviewing the record on appeal, and having had the benefit of oral argument, we find that substantial record evidence supports the ALJ's findings and the decision is in accordance with the law. Thus, we deny JCI's petition for review and uphold the Commission's final order.

AFFIRMED.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. John Carlo, Inc., Respondent.	OSHRC Docket No. **04-1405**

Appearances:

Michael Hagan, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

George E. Spofford, IV, Esq., Glenn Rasmussen Fogarty & Hooker, P.A., Tampa, Florida
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

John Carlo, Inc. (JCI) is a corporation engaged in the installation of sewer and waterlines. The Occupational Safety and Health Administration (OSHA) conducted an inspection and investigation of respondent's jobsite at its Wesconnett Boulevard Project in Jacksonville, Florida. This investigation began on

March 31, 2004. As a result of this inspection and investigation, respondent was issued two citations. A hearing was held in Jacksonville, Florida, from November 15, 2005 through November 18, 2004 [sic]. Prior to the hearing, the parties settled Citation No. 1, Item 2 by amending the alleged violation of 29 C.F.R. § 1926.301(h)(1) to an "other" violation with no penalty. Remaining at issue are the violative conditions alleged in Citation No.1, Item 1 and Citation No. 2, Item 1. For the reasons that follow, Citation No.1, Item 1 is vacated and Citation No. 2, Item 1 is affirmed and a penalty of $50,000.00 is assessed.

Background

Respondent, JCI, had a jobsite in Jacksonville, Florida on March 31, 2004. This jobsite was part of a road improvement project known as the Wesconnett Boulevard Project. At this project, JCI installed PVC sewer line down the middle of an existing roadway. At one location, the new line was to be installed approximately 12 feet below an existing flexible 2 inch diameter gas line that was perpendicular to the sewer line. Running parallel to the proposed location of the pipe there also were buried gas, water, and telephone lines.

On March 30, 2004, and March 31, 2004, respondent's crew was laying a sewer line at the intersection of Anderson Road and Wesconnett Boulevard in a 14.5-foot-deep excavation in Type C soil. The crew worked inside two stacked trench boxes on March 30,

2004. The bottom box was 8 feet high and the top box was 6 feet high. Pipe was laid that day up to the location where the gas line crossed the trench for the sewer line.

On March 31, 2004, respondent's crew removed the top trench box, pulled the bottom box under the perpendicular gas line and prepared the bottom of the trench to lay one 13-foot-long joint of the pipe. Two employees entered the 14.5-foot deep trench and worked inside the 8-foot-high trench box for at least 20 to 30 minutes. The trench walls above the box were not sloped. While these employees were in the trench, a large clay ball dislodged, fell into the trench and killed one employee.

Joint Stipulations of Fact

At the hearing, the parties stipulated as follows:

1. The Review Commission has jurisdiction.
2. John Carlo, Inc., was engaged in an industry that affects interstate commerce.
3. The cited standard applies with regard to the trenching violation.
4. The trench was not in conformity with the cited standard.
5. The soil involved at the trench site was type C soil.

6. At and before the workplace accident on March 31, 2004, respondent's project superintendent, Lester (Sonny) Cox, knew of OSHA's applicable trenching and excavation standards' provisions requiring the use of trench boxes, sloping or shoring or some combination of these according to the conditions at the worksite, and of respondent's applicable trenching and excavation employee safety rules.

7. Respondent's foreman, James Jacobs, was Respondent's highest ranking supervisor at the cited workplace at the time of the accident on March 31, 2004.

8. Subsequent to the cave-in at the trench at Respondent's cited workplace, i.e., identified by OSHA's Inspection File No. 306750035, which is the inspection site located on Anderson Road and Wesconnett Boulevard, Jacksonville, Florida, Respondent was able to slope the trench walls back to the proper angle, i.e., at less than the maximum allowable slope for the type of soil at the cited location and to complete its laying of the pipe at that location without moving or removing or having the TECO Energy/People's gas line(s) removed.

9. Respondent's safety manual addresses safe trenching practices.

10. Respondent conducted some oral tool box talks at the cited workplace.

11. Respondent's foreman, James Jacobs, was terminated as a result of the accident that gave rise to the citation, and the official separation notice indicates that Respondent would rehire Jacobs.

In her pre-hearing statement, the Secretary made the following statement: "Respondent's written safety program was adequate on the date of the accident, March 31, 2004, although the parties disagree that it was effectively communicated and enforced at the cited worksite, particularly so much of it as concerns trench safety."

At hearing, the Secretary moved to amend the word "adequate" to "generally adequate". Over objection, the motion was granted. The Secretary was granted the right to address the accuracy of certain provisions of respondent's safety program.

Late on the third day of the hearing, Respondent moved to amend its affirmative defense of employee misconduct to include the conduct of its project superintendent, Lester Cox. Over objection, that motion was granted . The Secretary was given the opportunity to meet that defense. After overnight consideration, the Secretary chose to address this defense in her post hearing brief.

Discussion

The Secretary has the burden of proving the violation:

> In order to establish a violation of an occupational safety or health standard the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Alleged Serious Violation of
29 C.F.R. § 1926.250(a)(1)

The Secretary in Citation No. 1, Item 1 alleges that:

> Materials stored in tiers were not stacked, racked, blocked, interlocked, or otherwise secured to prevent sliding, falling or collapse:
>
> a. On or about April 5, 2004, in the laydown area, the concrete pipes were not stored in a manner to prevent them from rolling, exposing employees to the hazard of being crushed by the pipes.

The standard at 29 C.F.R. § 1926.250(a)(1) provides:

> All materials stored in tiers shall be stacked, racked, blocked, interlocked, or otherwise secured to prevent sliding, falling or collapse.

Concrete pipes, each weighing over 6600 pounds were stored in respondent's laydown area, stacked in tiers no more than two pipes high. Pipes 8 to 10 feet long, 48 inches in diameter, were stacked with large diameter ends alternating with narrow ends. The concrete pipes were stored on sand. The Secretary presented insufficient evidence to prove that respondent's method of stacking the concrete pipes failed to prevent them from rolling. The Secretary has, therefore, not shown respondent's noncompliance with the terms of the standard. The alleged violation of 29 C.F.R. § 1926.250(a)(1) is vacated.

Alleged Willful Violation of 29 C.F.R. § 1926.652(a)(1)

The Secretary in Citation No. 2, Item 1 alleges that:

> Each employee in an excavation was not protected from cave-ins by an adequate protective system in accordance with paragraph (b) or (c) of this section:
>
> a. On or about March 31, 2004, employees working in the 14 feet, 6 inches deep trench were not adequately protected from the hazard of a trench collapse.

The standard at 29 C.F.R. § 1926.652(a)(1) provides:

(a) *Protection of employees in excavations.* (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

(i) Excavations are made entirely in stable rock; or

(ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

The parties stipulated that the cited standard, 29 C.F.R. § 1926.652(a)(1) is applicable and that the trench was not on conformity with that standard. They further stipulated that the soil involved at the trench was Type C soil. The Secretary's compliance officer measured the depth of the trench on March 31, 2004 and determined it to be 14.5 feet deep. One 8-foot-high trench box was in that trench on that date. No other form of shoring or shielding was used by respondent to protect employees in the excavation on that date. It is undisputed that two employees of the respondent worked in the trench inside the trench box for at least 20 to 30 minutes on the morning of March 31, 2004; and that a large clay ball dislodged, fell into the trench and killed one employee. Prior to March 31, 2004, respondent's crew stacked a 6 foot high trench box on top of the 8-foot-high box to protect employees working in the 14.5-foot-deep trench.

The stacked boxes were used up to the point where a gas line crossed the trench. The gas line passed over the trench about 12 feet above the bottom of the trench. Respondent's foreman, James Jacobs was the highest ranking supervisor at the trench at the time of the accident (Stipulation No.7). Respondent's project superintendent knew of the applicable OSHA trenching and excavating standards (Stipulation No. 6). After the accident, respondent was able to adequately slope the trench walls without moving the gas lines.
(Stipulation No.8).

Respondent, through its foreman, James Jacobs, had knowledge of the violative conditions at the worksite on March, 31, 2004, the day of the accident. He was aware of the requirements of 29 C.F.R. § 1926.652(a)(1). He directed the work on March 30, 2004, the day prior to the accident, and used two stacked trench boxes to protect employees up to the location where the gas line crossed the trench. At that point all work ceased. On March 31, 2004, prior to the accident, the foreman removed the top box, pulled the lower box under the gas line and directed two employees to enter the inadequately shored trench to lay one 13-foot section of sewer pipe. Jacobs testified that three weeks before the accident he became aware that the gas line would cross the trench at this location.

The Secretary has established a violation of 29 C.F.R. § 1926.652(a)(1). The violation was a serious violation in that there was a substantial probability

that death or serious physical harm could result from the violative conditions. Without adequate protection by shoring or sloping, employees working in this excavating were exposed to the hazard of cave-in of the walls of the excavation. Cave-ins result crushing injuries. Here one employee died.

Wilfulness [sic]

To establish a violation as willful, the Secretary must prove that it was committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *Lanzo Construction Co.,* 20 BNA OSHC 1641 (No. 97-1821, 2004), affirmed *Lanzo Construction Co. v. OSHRC,* 21 BNA OSHC 1432 (11th Cir. 2005) (defining willfulness as an intentional disregard of or plain indifference to OSHA requirements).

The Secretary must show that the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care. *Propellex Corporation,* 18 BNA OSHC, 1677 at 1684 (No. 96-0265, 1999). John Carlo, Inc. is a corporation which acts through its agents. To understand the state of mind of a corporation, the state of mind of its agents acting on its behalf must be determined. Respondent's agent on this jobsite was James Jacobs, its foreman. He was the competent person on site and directed the work of other employees. Lester "Sonny" Cox, respondent's project superintendent, was

also a corporate agent and a competent person in this jobsite. He directed and had responsibility for all work done by respondent's employees on the project. He was the direct supervisor of Jacobs on this jobsite.

Throughout this project, respondent's crew used stacked trench boxes to protect employees laying sewer pipe in trenches. At least five months before the collapse on March 31, 2004, respondent's General Superintendent, John Solich, and Project Superintendent, Lester Cox, were aware that a gas line crossed the intended path of the trench at the location of the collapse. The crew used stacked trench boxes on March 30, 2004, up to the exact point where the gas line crossed the trench. Upon reaching that location work stopped. The stacked boxes were left in the trench against the gas line. Cox and Jacobs met on that date to decide how to proceed. They knew at that time the stacked boxes would not pass under the gas line. They met again before work began on March 31, 2004.

Barry Brown, respondent's pipelayer working in the trench at the time of the collapse, was in the jobsite office when Cox and Jacobs met on both days. While he knew the conversation on March 30, 2004 involved a decision on how to work in the area of the gas line, he did not hear exactly what was said by either Cox or Jacobs. Mr. Brown testified that at the meeting on March 31, 2004, he was told by both Cox and Jacobs to pull the stacker box and slope back as far as they could. This involved removing the top

trench box and pulling the 8-foot-high bottom trench box under the gas line to install one section of pipe.

Brown testified that under the direction of Jacobs, the crew removed the top trench box. Jacobs operated the trackhoe to remove the box from the trench, to dig under the gas line and to pull the bottom box into position under the gas line.

James Jacobs, respondent's foreman, testified that he first became aware of the gas line crossing the trench path three weeks before the collapse. He saw the locator flags and was told about this condition by his superintendent. Jacobs discussed this situation again with his project superintendent one week before the accident. At that time, Jacobs and Cox discussed how they would go under the gas line. Regarding that conversation, Mr. Jacobs testified as follows:

Q. Specifically, what did you talk about with Mr. Cox as to the plan for dealing with the gas line?

A. I had asked him how did they have planned for us to go under them gas lines to get our pipe in the ground.

Q. You asked Mr. Cox whether he had plans for how you were to go under the gas line?

A. Yes, sir.

Q. At the time that you had that conversation with Mr. Cox were you referring to any site plan?

A. Yes.

Q. Was it Exhibit C-3 that you were – a document like C-3 or C-3 that you were looking at?

A. Yes, sir.

Q. What was his answer?

A. He told me we was going to have to pull the trenchbox and I told him, I said, "With the existing utilities in the ground and everything and us not knowing where the gas main was coming with the two-inch service on it and everything," I told him, I said you know, "Tell me what we're suppose to do."

And he said, "What you're going to have to do is, is pull your trenchbox and do not dig it no wider than six foot,"

(Tr. 443)

Cox and Jacobs met again on March 29, 2004, two days before the accident. They first met that day before work at the jobsite office. Mr. Jacobs testified as to that conversation as follows:

A. I had asked him again.

Q. You had asked him what again?

A. About pulling – I asked him, I said, "Are you sure that's the way we need to do this?" And he says, "Yes, pull the trenchbox."

And that's when I brought up to him, I said, "We're not going to be able to slope it." And he says, "I understand that."

And he told me, he says that they had bidded this job to be no wider than six foot because of the fill that we was – the good fill we were bringing back in to put back in to put back in and taking the old fill out.

Q. So he told you that they had bid the job at no wider than six feet?

A. Yeah.

Q. And fill, are you talking about –

A. Good suitable dirt to go back in.

Q. So you called to his attention at that time that if you did what he said, that you would not be able to slope the trench?

A. Yes, sir.

Q. Slope it outside the trenchbox?

A. Yes, sir.

Q. Did he say anything at all to you at that time besides referring to the bid the job for six feet?

A. No, sir, no other than the existing utilities underground and the gas line and the phone lines was another reason why.

(Tr. 448-449)

Cox and Jacobs had another conversation later that afternoon at Jacobs trench site. That discussion related to the gas line. Mr. Jacobs testified as to the nature of that conversation as follows:

Q. And what was the conversation at that time?

A. About the gas lines and the phone lines and the existing utilities.

Q. And did you ask any questions about what you were to do?

A. Yes, sir.

Q. What was the question that you asked?

A. I asked him were we still going to pull the stacker box off the trenchbox. He says, "Yes, do it like I told you to do it." I said "Okay."

(Tr 449-450)

Mr. Jacobs' conversations with management about this situation were limited to Mr. Cox, his boss and direct line supervisor.

On the morning of the accident, Mr. Cox and Mr. Jacobs met again at the project site office to discuss the procedure to be used that day at the location of the gas line. Mr. Jacobs testified that he understood his instructions from Cox were to pull the stacker box and not to slope the trench any wider than six feet. He told his crew that the walls were to be straight up and down with no slope. He then pulled the top stacker box off the bottom box and pulled the bottom trench box under the gas line with the trackhoe. Mr.

Jacobs testimony is consistent with the testimony of Mr. Brown regarding conversations with Mr. Cox at the project office on March 31, 2004, and subsequent actions taken by Jacobs and his crew.

On cross examination, Mr. Jacobs testified concerning his conversations with Mr. Cox about the procedures to be used in the trench at the location of the gas line as follows:

> Q. Is it your understanding or is it your testimony that Mr. Cox told you that the trench walls would be vertical from the pipe invert, the bottom of the pipe, straight up to the surface of the ground without any attempt to slope them back?
>
> A. No, sir. He told me once I pulled the stacker box, because I told him, I said, "You know that we're not to be able to slope it." He says, "Yes, I understand that. Y'all be careful."
>
> Q. How did you interpret that? Does that mean you were not to slope it at all or slope it back as best you can slope it back in conformity with John Carlo rules? How did you understand that?
>
> A. The way I took it from Sonny was, was not to slope it.
>
> * * *
>
> A. Mr. Cox told me – I asked him whenever we got to that point and everything, I said "We're going to pull the trenchbox and we're

not going to be able to slope the banks back." And he said, "Right."

Q. And how far – what was your understanding how far were you suppose to use this operation without any slope?

A. Just to get under the gas line and that was it.

Q. Did you perform any sloping or any benching or anything like that when you installed or when you attempted to do the work in that vicinity?

A. No, sir.

Q. Why didn't you go to a John Carlo superior? Why didn't you go to someone else when Mr. Cox told you this?

A. Because my job was to tell Sonny and Sonny's job was to go to the higher man. That's why we have a superintendent on the job.

* * *

Q. And at the time that your crew members entered this trench, did you understand that that trench was not in conformity with OSHA guidelines?

A. Yes, sir.

Q. And was it your understanding Mr. Cox was essentially telling you to dig this trench not in conformity with OSHA guidelines?

A. They way I took it, yes, sir, the way he explained it to me, because I asked Mr. Cox about once I pulled the stacker box, about getting steel sheets out here to drive down beside this trenchbox, and he said John Carlo wouldn't do that.

(Tr. 465-469)

Mr. Jacobs reiterated emphatically that Mr. Cox told him that they could not slope the trench because of the way they bid the job plus the existing utilities in the ground. Subsequent to the accident, Chris Wynette supervised Jacobs at this location during the installation of sewer pipe under the gas line. Jacobs told Wynette that, after the accident, other trenchboxes were brought in since the trench could only be dug six feet wide. This statement to Wynette after the accident is consistent with Jacobs' testimony about his discussions with Cox and is consistent with Brown's testimony.

Lester Cox was respondent's project superintendent and directly supervised James Jacobs and his crew. He testified that he had three or four discussions with Jacobs about installation of the sewer pipe at the location of the gas line. He testified that Jacobs was to accomplish the crossing of the gas line as follows:

A. Well, first thing – It was my understanding the first thing we was going to do was to locate the existing utilities and see how they would directly affect our ditch line. And then that would determine to whether – on how

we would approach it as far as making the actual excavation and installation at the time.

* * *

A. Number one, we didn't know if it was going to be in direct conflict with our pipe line. Number two, we didn't know how deep they were and whether we could create enough slack in the existing utilities across the ditch to allow both trench boxes to be used. And that's why we had to find out where they were and how deep they were.

Q. And which utilities are these? Are these utilities that are perpendicular to your trench line crossing or were they parallel?

A. Perpendicular.

(Tr 646)

Mr. Cox later testified that he was pretty confident they would need to remove the top trench box because of the perpendicular gas lines. Cox stated that he met with Jacobs at the jobsite field office on the morning of the accident. He testified that there was a question about whether the stacker box could be used, depending on the depth of the gas line. When questioned whether, during planning on March 31, 2004, he knew if it was possible to slope the trench, Mr. Cox responded:

A. We didn't know. We knew it was going to be difficult. I mean, that morning, we had talked about it and, you know, I said to him,

> I said, "Peewee, we've got to find all these existing utilities before we figure out how we're going to attack this a hundred percent." That's they way it was left when we left the office that morning.

(Tr. 647-648)

Cox testified that Jacobs never told him he could not slope or use the stacked trench box. Cox said his understanding was that Jacobs would stop the work if he could not slope due to the proximity of the gas line or parallel utilities. Cox denied telling Jacobs he wanted vertical walls on the trench at the area of the gas line or that he wanted the narrowest trench. When he arrived at the accident site, the trench walls were nearly vertical. Cox stated that a week or so before the accident he met with Jacobs in the office about safety issues relating to the trench and gas line where the accident occurred. John Solich, the project general superintendent and Tom Kelecius, the project manager were present during this meeting. Cox testified that they decided "to uncover existing utilities, find the locations and depth, and base our plan of attack from that." (Tr. 677).

Cox gave a statement to the Secretary's compliance officer on March 31, 2004, after the accident. He stated that he had discussed with Jacobs not using the top part of the trench box because the utilities were in the way. He also said the trench wall could not be cut back because utilities were in the way. (Exhibit C-23)

On April 2, 2004, Cox gave a more detailed statement to the Secretary in his capacity as project superintendent. This statement was made three days after the accident and in it Cox stated in part:

> We did not stop the job when we encountered the gas lines to better protect the upper half from cave ins because we thought we had it figured out. We removed the top trench box and just used the lower one. We only had one jointed pipe to put in and we thought we could get it done. Once the trench is dug, it takes approximately 15 minutes to install 1 section of pipe. I can't say we thought of a different way, or using sloping on shoring in addition to the trench box in that area (accident site area). I had not gotten to the accident area of the site that morning until the accident so I can't say what James was thinking at that time. We had discussed the gas lines, and other utilities since Monday – to remind him to be careful and not hit/break any of them. We had also discussed seeing if the gas lines in that area were going to have enough slack to work around them, as we had with the other lines, to still use two trench boxes but that was about it.
> (Exh. C-24)

Barry Brown testified he, as part of Jacobs' crew, found the exact location of the gas line on March 30, 2004, the day before the accident. The crew dug the area by hand on that day to locate the perpendicular gas line.

Brown described the actions of the crew at the end of work on March 30, 2004 as follows:

> Q. Did you – on the day before the accident occurred, at the end of the work day, did your crew remove the trenchboxes and fill in what had been done?
>
> A. They did not remove the trenchboxes. They left the trenchboxes up against the gas main and decided that we could not go under the gas main with the trenchboxes, so we had to regroup and figure out what we was going to do.
>
> (Tr. 344)

This testimony is consistent with that of James Jacobs as to the sequence of events on the days prior to the accident. The gas line, according to Brown was located on March 30, 2004. Since the crew knew the location of the gas line at the end of that workday, there was no need to continue to look for that line on March 31, 2004, as Cox indicated in his testimony. Jacobs and Brown knew on March 30, 2004, that the stacked trench boxes would not pass under the gas line.

Cox's testimony that on March 31, 2004, he did not know that Jacobs' crew could not slope or use the stacked trench boxes lacks credibility. His testimony is inconsistent with the testimony of James Jacobs and Barry Brown. It is also grossly inconsistent with his detailed statement given to the Secretary on April

2, 2004 (Exhibit C-24). In that statement, he admitted that the job was not stopped to protect the upper half of the trench from cave-in when the gas line was encountered. He admitted that the top box was removed and only the bottom box was used. He admitted that no other method of shoring or sloping was considered. He reasoned that exposing employees to the hazard of cave-in was acceptable since "We only had one jointed pipe to put in and we thought we could get it done. Once the trench is dug, it takes approximately 15 minutes to install 1 section of pipe." (Exh. C-24).

I accept this statement as an accurate reflection of the true state of mind of Lester Cox, respondent's project superintendent, on the date of the collapse, March 31, 2004. That statement is consistent with the testimony of James Jacobs, respondent's foreman and Barry Brown, respondent's employee in the trench at the time of the accident.

After observing the demeanor and hearing the testimony of Cox, Jacobs and Brown, I find the testimony of Lester Cox to lack credibility and no weight is given to that testimony. His testimony was inconsistent with the testimony of Mr. Jacobs and Mr. Brown. It was also diametrically opposed to and inconsistent with his own statement given in his capacity as respondent's project superintendent on April 2, 2004. That statement, given only three days after the accident, more accurately reflects Mr. Cox's state of mind as events unfolded on March 31, 2004 and during the days and weeks leading up to the

cave-in. I further find the testimony of James Jacobs and Barry Brown to be credible. Testimony of both witnesses was consistent with each other, internally consistent, and consistent with the statement of Mr. Cox in Exhibit C-24.

Respondent, through Cox and Jacobs, was actually aware, at the time of the violative act, that the act was unlawful. Respondent is a corporation which acted through its agents, James Jacobs, its foreman, and Lester Cox, its project superintendent. Both Cox and Jacobs knew their decisions and actions violated 29 C.F.R § 1926.652(a)(1). Both knowingly and deliberately proceeded to expose employees to the hazards of cave-in of the excavation walls without protection of employees by shoring or sloping.

Both Cox and Jacobs had competent person training required by 29 C.F.R Subpart P-Excavations. A competent person is defined in 29 C.F.R § 1926.650(b) as follows:

> *Competent person* means one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

Respondent is in the business of digging trenches and other excavations. It does this every day of every week to lay sewer pipe. The standard violated by respondent sets forth the basic requirements to

protect employees in excavations with protection from cave-in. Respondent knew the requirements of this standard and deliberately chose to ignore those requirements. It was more expedient to place employees in an unprotected trench for 15 minutes to lay one joint of pipe than to take the time to adequately shore or slope the trench to protect employees.

The situation of the gas line crossing the path of the trench was not an unexpected situation. Top management officials of respondent knew about this condition for several months prior to the accident. John Solich, respondent's general superintendent met with Cox in October or November, 2003 to discuss the situation. As a result of that meeting, they asked the gas company to move the gas line. As of March 31, 2004, the gas line had not been relocated. Respondent bought this company from Milestone Carlo on January 1, 2004, according to the testimony of Gordon Wall, respondent's safety manager. After the purchase, Solich had several other meetings and discussions with Cox and other management officials to discuss this condition prior to the accident date. Respondent considered this situation to be its greatest liability on this jobsite. While this was the first gas line to cross the trench path, other utilities crossed respondent's trenches previously on this project.

Respondent's safety manual contains detailed sections entitled Excavation, Trenching and Shoring Policy and Trench Safety Policy (exhibit R-8). The Secretary stipulated at the hearing that this safety

manual was generally adequate as it related to trench safety. A thorough review of this safety manual indicates a heightened awareness by respondent of the hazards resulting from failing to protect employees in trenches by shoring or sloping.

Respondent argues that it has concern for employee safety and made a good faith effort to accomplish safety for its employees. This case arose at a jobsite in Jacksonville, Florida. The applicable case law is that of the Eleventh Circuit Court of Appeals. That court does not recognize a good faith defense to an allegation of willfulness. *Lanzo Constuction* [sic] *Co. v. OSHRC*, 21 BNA OSHC, supra at 1434. While the Review Commission does recognize such defense, respondent has failed to meet its burden even under Review Commission case law. *See e.g. Lanzo Construction Co.*, 20 BNA OSHC, supra at 1648 and cases cited therein. Here, there was no effort to comply with the requirements of the standard or otherwise protect employees working in the trench from cave-in of trench walls above the level of the 8 foot high trench box. The top 6.5 feet of the vertical trench were not shored, sheeted or sloped. Respondent knew this and decided to take a chance based on expediency. Respondent gambled that it could get in, lay the pipe and get out without a cave-in. This is not a good faith approach to protecting employees or complying with the law. Respondent's actions show intentional disregard of the requirements of the Act and plain indifference to those requirements and to employee safety. Under Review Commission law and the law of

the Eleventh Circuit, respondent willfully violated 29 C.F.R § 1926.652(a)(1).

Unpreventable Employee Misconduct

In order to establish that the violation of 29 C.F.R. § 1926.652(a)(1) was the result of unpreventable employee misconduct, respondent must prove that

> (1) it has established work rules designed to prevent the violations, (2) it has adequately communicated these rules to its employees, (3) it has taken steps to discover violations, and (4) it has effectively enforced the rules when violations have been discovered.
>
> *Jensen Construction Co.*, 7 BNA OSHC 1477 (No. 76-1538, 1979)

Here, respondent has made a progressive argument as to the employees that it alleges engaged in unpreventable employee misconduct. In answer to Complainant's interrogatories, respondent stated that James Jacobs, its foreman, and Comer Lindley, the deceased employee working in the trench engaged in unpreventable employee misconduct. (Exhibit C-1).

Respondent claimed in those responses that Lester Cox told Jacobs to slope the sides of the trench or use stacker trench boxes on the day of the collapse. Respondent stated that Jacobs engaged in misconduct by failing to slope the trench and by removing the stacker box.

Respondent in further answer to the Secretary's interrogatories, stated that Comer Lindley engaged in employee misconduct by failing to abide by instructions of his foreman to face the open side of the trench.

At the end of the third day of trial, respondent moved to amend its answer to add a third individual as engaging in unprevetable [sic] employee misconduct. It requested that Lester Cox be added to the list. Respondent alleged that Cox's misconduct was based on failure to adequately supervise. The Review Commission maintains a liberal policy regarding amendments to pleadings, even during trial. Since respondent had previously pled this defense, its motion to expand to include Cox was granted. The Secretary was granted the opportunity to meet this modification to respondent's defense and chose to address it in her brief.

Respondent's claim that Comer Lindley engaged in misconduct is rejected. Gordon Wall, respondent's safety manager, testified that respondent has no rule prohibiting employees from having their backs to the open end of a trench box. No evidence was presented that he was instructed by Jacobs to face the open end. He could not have performed his work in such position since he would be facing away from the pipe he was trying to position.

James Jacobs did remove the top stacked trench box and did not slope the trench walls above the bottom trench box. His actions do not constitute unpreventable employee misconduct. As discussed at

length above in this decision, his actions were in accordance with instructions given him by his direct supervisor, Lester Cox, the project superintendent. He specifically followed the direct orders of Cox, the highest ranking supervisor for respondent on this project: Jacobs had several discussions with Cox and other management officials during which he questioned how management wanted him to lay the one length of sewer pipe under the gas line. He raised safety concerns with Cox during several discussions until and including those held on the day of the accident. In the final analysis, he was ordered by Cox to perform the job by removing the top box and placing the pipe with the trench walls unsloped above the bottom trench box.

Lester Cox was the only superintendent and respondent's highest ranking supervisor on this project. He has over forty years experience in underground experience. He was a superintendent for twenty years and a foreman before that for ten years. He supervised all crews in all areas of the project including pond excavation, field site work, grading and the work of three pipe crews. He scheduled the crews and equipment for the entire project. Cox supervised all foremen on the site. He met with the foremen on the field office and visited the crews daily, dealing with problems and compliance with safety and other regulations. He dealt with existing utility conflicts and hazards. Cox had full authority to stop work and to hire and fire employees. Cox monitored

safety on the project. When Cox was not present, the foremen had responsibility for safety.

To determine whether the violation was the result of unpreventable employee misconduct, the evidence must be analyzed generally under the *Jensen* test. In addition, where, as here, the respondent alleges that Cox and Jacobs, supervisory employees, were engaged in misconduct there is an additional analysis required by the Review Commission in *Archer-Wester* [sic] *Contractors, Ltd.* 15 BNA OSHC 1013 (No. 87-1067, 1991).

The Secretary first stipulated prior to hearing that respondent's safety program was adequate on March 31, 2004. At the hearing, the Secretary's motion to amend was granted to stipulate that respondent's safety program was generally adequate. The complainant presented evidence showing respondent's safety manual contained material errors as to OSHA's trenching requirements regarding the appropriate degree of sloping for Type C soil (34° v. 45°) and the minimum height of a trench box above surrounding soil (12" v. 18"). Seven other errors in its safety manual were noted by the Secretary's compliance officer and set forth on page 28 of the Secretary's brief. Respondent did not correct these obvious errors or communicate the correct information to employees on this project prior to the accident on March 31, 2004.

By misstating the degree of sloping and the minimum height of a trench box above the surrounding soil, respondent failed to establish specific work

rules designed to prevent this violation. By misstating these requirements, the work rules do not eliminate employee exposure to the hazard covered by the standard.

Respondent did not have all if [sic] its training programs in place in Florida on the date of the accident. Gordon Wall, respondent's safety director, testified that on March 31, 2004, respondent had tool box talks and oral communication of safety in place on this project. Wall admitted that Cox and Jacobs did not receive respondent's annual kickoff safety training for supervisors. He also admitted that Cox and Jacobs did not receive total training as of the accident date. Both Jacobs and Cox had competent person training relating to trench safety. Both received this training long before they went to work for the respondent. Neither received this or other safety training from the respondent. Even though neither of these supervisors received adequate safety training by respondent, they were responsible for communicating safety information to employees through discussion, tool box talks and on-site supervision.

Employees were given copies of respondent's safety manual, but no effort was made to assure the employees understood its contents. Lester Cox gave Comer Lindley a copy of the safety manual, but Lindley did not sign the form indicating that he received it. Cox did not determine whether Lindley understood the contents of the Safety manual. He also failed to determine whether Lindley had prior

safety training, and Lindley did not attend the Monday site safety meeting before the accident. Respondent failed to adequately communicate its work rules to its employees on this project.

Several months before the accident, John Solich, respondent's general superintendent and Lester Cox, the project superintendent, knew the exact location that the gas line would cross the path of the sewer line to be installed. Multiple discussions were held to discuss the gas line situation, considered by respondent's managers to be their greatest liability on the project. Five months before the collapse, Solich and Cox sought to get the gas line relocated by the owner of the line. This did not happen. After purchasing the company on January 1, 2004, respondent knew for months it needed to devise a method to safely install the sewer pipe below the gas line. The result of management meetings was to deal with the problem when it actually arose. When the gas line was reached, respondent decided to remove the top stacker box and place the pipe with exposed vertical dirt walls over six feet above the heads of its employees. Respondent took initial steps to discover violations or hazards. It ignored the violative condition, however, when it was encountered and knowingly exposed its employees to the hazard of cave-in. Taking steps to discover violations necessarily includes addressing and correcting those violations when they are discovered. Respondent failed to address and correct the violative conditions at issue.

Gordon Wall, respondent's safety manager, testified that the company had a progressive disciplinary system and produced records of reprimand for various employees throughout to the company. Respondent claims it enforced its work rules by this disciplinary system. Contrary to this claim, Cox admitted he only called violations to the attention of employees and he never provided more severe discipline to an employee for a safety rule violation. No evidence was presented that respondent's management on this project issued anything other than verbal warnings to employees for safety violations prior to March 31, 2004. Evidence of verbal reprimands alone suggests an ineffective disciplinary system on this project. *See GEM Industrial Inc.*, 17 BNA OSHC 1861, at 1864 (No. 93-1122, 1996) (and the cases cited therein). Here, both the project superintendent and the foreman participated in the noncomplying conduct. This also suggests ineffective enforcement of work rules. *See GEM Industrial Inc.*, supra at 1865.

Termination after an accident or an investigation by OSHA may be considered in determining whether a work rule was effectively enforced. This action must be viewed, however, in conjunction with pre-accident discipline. *See R. Zoppo Company, Inc.*, 9 BNA OSHC 1392, 1396 (No. 14884, 1981). After this accident, both Cox and Jacobs were terminated. Cox's final evaluation was that he was on outstanding employee in all but two categories. In those two, he was rated satisfactory. His work was not rated as unsatisfactory

in any category. Jacobs' work was rated as satisfactory in all categories. In both separation notices, respondent indicated that it would rehire both Cox and Jacobs (Exhibit R-27 and R-28). Respondent gave no reason for the discharge of either employee. It checked the reason as "other." It did not check the box "conduct" as the reason for discharge. This is evidence that respondent did not consider the actions of Cox and Jacobs to actually be misconduct. Had respondent concluded that their misconduct resulted in a trench collapse and the death of another employee, surely that would have been reflected in their separation notices. Failure to state valid reasons for discharge, giving both employees high final performance ratings, and stating that the company would rehire both are actions totally inconsistent with respondent's claim that it adequately enforced its safety program and rules.

Respondent claims that unpreventable employee misconduct was that of the two supervisory employees. Where the alleged misconduct is that of a supervisory employee, an employer must show that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee. *Archer-Western Contractors, Inc.,* 15 BNA OSHC 1013 (No. 87-1067, 1991). In that case the Review Commission, citing *Daniel International Co. v. OSHRC,* 683 F.2d 631 (11th Cir., 1982) held that:

> Where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense

> is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision. *Id.* A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax. *Id*

Ancher-Western [sic] *Contractors, Inc.,* 15 BNA OSHRC, at 1017.

Respondent's management considered the gas line crossing the intended path of the sewer line to be their biggest problem and greatest liability. They sought to have the gas line moved. They had multiple meetings to discuss the situation. They collectively decided to address the situation as it arose. The project superintendent and the foreman met at least twice two days before the accident and again on the morning of the collapse. The project superintendent, Cox, the top supervisory employee for respondent on the project, directly ordered Jacobs, the foreman, to perform the work exactly as it, in fact, was done. Jacobs voiced concerns about Cox's decision, but finally carried out those direct orders.

John Solich, respondent's general superintendent, discussed this situation with Cox on several occasions from at least November, 2003, until shortly before the accident on March 31, 2004. He stated this was not the first time on this project that utilities crossed the trench path although it was the first time for a gas line to intersect the trench. No evidence was presented to show anyone in respondent's upper management supervised or questioned Cox's handling

of this situation. Cox had the authority to make the decision to remove the top trench box and allow employees to work in the unshored and unsloped trench.

It was the responsibility of respondent's supervisory employees, Cox and Jacobs, to protect the safety of its employees working in the trench under their supervision on March 31, 2004. Their involvement in the decision to allow employees to work in this unprotected trench is strong evidence that respondent's enforcement of its safety program and rules was lax.

Cox and Jacobs acted consistently with the interests of the respondent, to quickly lay one joint of sewer pipe below the gas line without slowing the progress of the work. They thought they could get in and get out without harm. It was a decision based in concerns for expediency not for safety.

Respondent has failed to prove its defense that the willful violation of 29 C.F.R. § 1926.652(a)(1) was the result of unpreventable employee misconduct by Comer Lindley, James Jacobs or Lester Cox.

Penalty Assessment

Section 17(j) of the Act requires that when assessing penalties, the Commission must give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. 19 U.S.C. § 666(j). The Commission has wide

discretion in penalty assessment. *Kohler Co.,* 16 BNA OSHC 1769, 177) (No. 88-237, 1994).

Respondent is a large employer with over 1,000 employees, 50 employees on this project and 7 employees at this trench. On January 1, 2004, respondent bought Milestone – Carlo. Without evidence as to the nature of the relationship between respondent and Milestone – Carlo, I will not attribute the history of Milestone – Carlo to respondent. While I have found a willful violation, I find that respondent exhibited good faith during the investigation and inspection and in its later abatement of the violative condition.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.,* 15 BNA OSHC 1481, 1483 (no. 88-2691, 1992). The gravity of a particular violation "depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and likelihood that any injury would result." *J.A. Jones Construction Co.,* 15 BNA OSHC 2201, 2214 (no. 87-2059, 1993).

This was a seven person crew. Two employees worked in the trench for at least 20 to 30 minutes. Trench walls were vertical, with over six feet of unshored unsloped earth above the heads of the employees. Both the project superintendent and the foreman required the work to be done in this manner. Based on these factors, a penalty of $50,000 is assessed for the willful violation of 29 C.F.R § 1926.652(a)(1).

Finding of Fact and Conclusion of Law

The foregoing decision constitutes the finds [sic] of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Citation No. 1, Item 1 is vacated.
2. Citation No. 1, Item 2 is amended to "other" and no penalty is assessed.
3. Citation No. 2, Item 1 is affirmed as a willful violation and a penalty of $50,000 is assessed.

/s/ Stephen J. Simko, Jr.
STEPHEN J. SIMKO, JR.
Judge

* * *

May 11, 2006

[Certificate Of Service Omitted In Printing.]

[LOGO]

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

Office of
Executive Secretary

Phone: (202) 606-5400
Fax: (202) 606-5050

SECRETARY OF LABOR, Complainant, v. JOHN CARLO, INC., Respondent.	OSHRC Docket No. 04-1405

NOTICE OF FINAL ORDER

The Petition for Discretionary Review filed by the Respondent in the above cited action was received by the Commission on May 24, 2006. The case was not directed for review. **Therefore, the decision of the Administrative Law Judge became a final order of the Commission on June 23, 2006.** Commission Rule 90(d), 29 C.F.R. § 2200.90(d); Section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661(j).

ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE MUST FILE A PETITION

FOR REVIEW WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THE ABOVE FINAL ORDER DATE. *See* Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660; Fed. R. App. P. 15.

FOR THE COMMISSION

/s/ Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

Dated: June 26, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14425-II

JOHN CARLO, INC.,

Petitioner,

versus

SECRETARY OF LABOR,

Respondent.

On Appeal from the United States District Court
for the Middle District of Florida

(Filed Aug. 7, 2007)

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: CARNES, WILSON and HILL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

29 U.S.C.A. § 651. Congressional statement of findings and declaration of purpose and policy

(a)[1] The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources –

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

---

[1] Section was enacted without subsec. (a) designation, which has been supplied editorially.

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this chapter and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

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29 U.S.C.A. § 666. Civil and criminal penalties

(a) Willful or repeated violation

Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

(b) Citation for serious violation

Any employer who has received a citation for a serious violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, shall be assessed a civil penalty of up to $7,000 for each such violation.

(c) Citation for violation determined not serious

Any employer who has received a citation for a violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of regulations prescribed pursuant to this chapter, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $7,000 for each such violation.

(d) Failure to correct violation

Any employer who fails to correct a violation for which a citation has been issued under section 658(a) of this title within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 659 of this title initiated by the employer in good faith and not solely for delay or avoidance of penalties), may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues.

(e) Willful violation causing death to employee

Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

(f) Giving advance notice of inspection

Any person who gives advance notice of any inspection to be conducted under this chapter, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more

than $1,000 or by imprisonment for not more than six months, or by both.

(g) False statements, representations or certification

Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(h) Omitted

(i) Violation of posting requirements

Any employer who violates any of the posting requirements, as prescribed under the provisions of this chapter, shall be assessed a civil penalty of up to $7,000 for each violation.

(j) Authority of Commission to assess civil penalties

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(k) Determination of serious violation

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

(*l*) Procedure for payment of civil penalties

Civil penalties owed under this chapter shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office.

29 C.F.R. § 1926.652 Requirements for protective systems.

(a) Protection of employees in excavations.

(1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

(i) Excavations are made entirely in stable rock; or

(ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

(2) Protective systems shall have the capacity to resist without failure all loads that are intended or could reasonably be expected to be applied or transmitted to the system.

(b) Design of sloping and benching systems. The slopes and configurations of sloping and benching systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (b)(1); or, in the alternative, paragraph (b)(2); or, in the alternative, paragraph (b)(3), or, in the alternative, paragraph (b)(4), as follows:

(1) Option (1) – Allowable configurations and slopes

(i) Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the

horizontal), unless the employer uses one of the other options listed below.

(ii) Slopes specified in paragraph (b)(1)(i) of this section, shall be excavated to form configurations that are in accordance with the slopes shown for Type C soil in Appendix B to this subpart.

(2) Option (2) – Determination of slopes and configurations using Appendices A and B. Maximum allowable slopes, and allowable configurations for sloping and benching systems, shall be determined in accordance with the conditions and requirements set forth in appendices A and B to this subpart.

(3) Option (3) – Designs using other tabulated data.

(i) Designs of sloping or benching systems shall be selected from and be in accordance with tabulated data, such as tables and charts.

(ii) The tabulated data shall be in written form and shall include all of the following:

(A) Identification of the parameters that affect the selection of a sloping or benching system drawn from such data;

(B) Identification of the limits of use of the data, to include the magnitude and configuration of slopes determined to be safe;

(C) Explanatory information as may be necessary to aid the user in making a correct selection of a protective system from the data.

(iii) At least one copy of the tabulated data which identifies the registered professional engineer who approved the data, shall be maintained at the jobsite during construction of the protective system. After that time the data may be stored off the jobsite, but a copy of the data shall be made available to the Secretary upon request.

(4) Option (4) – Design by a registered professional engineer.

(i) Sloping and benching systems not utilizing Option (1) or Option (2) or Option (3) under paragraph (b) of this section shall be approved by a registered professional engineer.

(ii) Designs shall be in written form and shall include at least the following:

(A) The magnitude of the slopes that were determined to be safe for the particular project;

(B) The configurations that were determined to be safe for the particular project; and

(C) The identity of the registered professional engineer approving the design.

(iii) At least one copy of the design shall be maintained at the jobsite while the slope is being constructed. After that time the design need not be at the jobsite, but a copy shall be made available to the Secretary upon request.

(c) Design of support systems, shield systems, and other protective systems. Designs of support systems shield systems, and other protective systems shall be

selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (c)(1); or, in the alternative, paragraph (c)(2); or, in the alternative, paragraph (c)(3); or, in the alternative, paragraph (c)(4) as follows:

(1) Option (1) – Designs using appendices A, C and D. Designs for timber shoring in trenches shall be determined in accordance with the conditions and requirements set forth in appendices A and C to this subpart. Designs for aluminum hydraulic shoring shall be in accordance with paragraph (c)(2) of this section, but if manufacturer's tabulated data cannot be utilized, designs shall be in accordance with appendix D.

(2) Option (2) – Designs Using Manufacturer's Tabulated Data.

(i) Design of support systems, shield systems, or other protective systems that are drawn from manufacturer's tabulated data shall be in accordance with all specifications, recommendations, and limitations issued or made by the manufacturer.

(ii) Deviation from the specifications, recommendations, and limitations issued or made by the manufacturer shall only be allowed after the manufacturer issues specific written approval.

(iii) Manufacturer's specifications, recommendations, and limitations, and manufacturer's approval to deviate from the specifications, recommendations, and limitations shall be in written form at the jobsite during construction of the

protective system. After that time this data may be stored off the jobsite, but a copy shall be made available to the Secretary upon request.

(3) Option (3) – Designs using other tabulated data.

(i) Designs of support systems, shield systems, or other protective systems shall be selected from and be in accordance with tabulated data, such as tables and charts.

(ii) The tabulated data shall be in written form and include all of the following:

(A) Identification of the parameters that affect the selection of a protective system drawn from such data;

(B) Identification of the limits of use of the data;

(C) Explanatory information as may be necessary to aid the user in making a correct selection of a protective system from the data.

(iii) At least one copy of the tabulated data, which identifies the registered professional engineer who approved the data, shall be maintained at the jobsite during construction of the protective system. After that time the data may be stored off the jobsite, but a copy of the data shall be made available to the Secretary upon request.

(4) Option (4) – Design by a registered professional engineer.

(i) Support systems, shield systems, and other protective systems not utilizing Option 1, Option

2 or Option 3, above, shall be approved by a registered professional engineer.

(ii) Designs shall be in written form and shall include the following:

(A) A plan indicating the sizes, types, and configurations of the materials to be used in the protective system; and

(B) The identity of the registered professional engineer approving the design.

(iii) At least one copy of the design shall be maintained at the jobsite during construction of the protective system. After that time, the design may be stored off the jobsite, but a copy of the design shall be made available to the Secretary upon request.

(d) Materials and equipment.

(1) Materials and equipment used for protective systems shall be free from damage or defects that might impair their proper function.

(2) Manufactured materials and equipment used for protective systems shall be used and maintained in a manner that is consistent with the recommendations of the manufacturer, and in a manner that will prevent employee exposure to hazards.

(3) When material or equipment that is used for protective systems is damaged, a competent person shall examine the material or equipment and evaluate its suitability for continued use. If the competent person cannot assure the material or

equipment is able to support the intended loads or is otherwise suitable for safe use, then such material or equipment shall be removed from service, and shall be evaluated and approved by a registered professional engineer before being returned to service.

(e) Installation and removal of support –

(1) General.

(i) Members of support systems shall be securely connected together to prevent sliding, falling, kickouts, or other predictable failure.

(ii) Support systems shall be installed and removed in a manner that protects employees from cave-ins, structural collapses, or from being struck by members of the support system.

(iii) Individual members of support systems shall not be subjected to loads exceeding those which those members were designed to withstand.

(iv) Before temporary removal of individual members begins, additional precautions shall be taken to ensure the safety of employees, such as installing other structural members to carry the loads imposed on the support system.

(v) Removal shall begin at, and progress from, the bottom of the excavation. Members shall be released slowly so as to note any indication of possible failure of the remaining members of the structure or possible cave-in of the sides of the excavation.

(vi) Backfilling shall progress together with the removal of support systems from excavations.

(2) Additional requirements for support systems for trench excavations.

(i) Excavation of material to a level no greater than 2 feet (.61 m) below the bottom of the members of a support system shall be permitted, but only if the system is designed to resist the forces calculated for the full depth of the trench, and there are no indications while the trench is open of a possible loss of soil from behind or below the bottom of the support system.

(ii) Installation of a support system shall be closely coordinated with the excavation of trenches.

(f) Sloping and benching systems. Employees shall not be permitted to work on the faces of sloped or benched excavations at levels above other employees except when employees at the lower levels are adequately protected from the hazard of falling, rolling, or sliding material or equipment.

(g) Shield systems –

(1) General.

(i) Shield systems shall not be subjected to loads exceeding those which the system was designed to withstand.

(ii) Shields shall be installed in a manner to restrict lateral or other hazardous movement of the shield in the event of the application of sudden lateral loads.

(iii) Employees shall be protected from the hazard of cave-ins when entering or exiting the areas protected by shields.

(iv) Employees shall not be allowed in shields when shields are being installed, removed, or moved vertically.

(2) Additional requirement for shield systems used in trench excavations. Excavations of earth material to a level not greater than 2 feet (.61 m) below the bottom of a shield shall be permitted, but only if the shield is designed to resist the forces calculated for the full depth of the trench, and there are no indications while the trench is open of a possible loss of soil from behind or below the bottom of the shield.

[SEAL] **UNITED STATES OF AMERICA**
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor,

Complainant

v.

OSHRC Docket No. **03-2162**

W.G. Yates & Sons Construction Co., Inc., Hvy. Div.,

Respondent.

Appearances:

J. Phillip Giannikas, Esquire
Office of the Solicitor
U.S. Department of Labor
Nashville, Tennessee
For Complainant

Robert E. Rader, Jr., Esquire
Rader & Campbell
Dallas, Texas
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

W.G. Yates Construction Co., Inc., Hvy. Div. (Yates) is engaged in construction contracting. On September 11, 2003, the Occupational Safety ad [sic] Health Administration (OSHA) conducted an inspection of the Respondent's jobsite in Hoover, Alabama. At the time of this inspection, the Respondent was responsible for the site work for a shopping center and business complex. This work included dirt work and paving. As a result of this inspection, the

Respondent was issued a citation and notification of penalty. The Respondent filed a timely notice contesting the citation and proposed penalties. A hearing was held in Birmingham, Alabama, on May 26, 2004. For the reasons that follow, Citation No. 1, Item 1, is affirmed and a penalty of $5,000.00 is assessed; Citation No. 1, Item 2, is affirmed and a penalty of $4,000.00 is assessed.

Background

The Secretary's compliance officers, James Cooley and Ron Hynes, were delivering information to a commercial mall development in Hoover, Alabama, on September 11, 2003. While there, they conducted a brief inspection of another employer. As they prepared to leave the jobsite, the compliance officers noticed three workers laying grass matting on a slope. These individuals were 200 to 300 yards from Mr. Cooley and Mr. Hynes. Two of these workers were wearing safety harnesses backwards. One individual wore no form of fall protection. He was later identified as Martin Olvera, a foreman for Yates. All three worked for the Respondent. At the bottom of the slope where these men were located, the landscape dropped off precipitously 65 feet. After first observing these employees, the compliance officers proceeded cautiously to the area. Fifteen to 20 minutes elapsed between the inspectors' first observation of the three-man crew and their arrival at the employees' location. When Mr. Cooley and Mr. Hynes reached the work

area, they photographed these employees still working on the slope: the foreman without fall protection, and the two crew members with safety harnesses on backwards. The compliance officers met with Mr. Olvera, who identified himself as the Respondent's foreman. The inspectors began their inspection. Within a few minutes, John O. Ray, the project superintendent for Yates, arrived at the scene. He stated that Olvera worked for him. He also said that he had inspected the jobsite twice that day. As a result of this inspection, the Respondent was issued a citation alleging two violations and proposing penalties totaling $10,000.00.

Discussion

The Secretary has the burden of proving the violation:

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Alleged Serious Violation of 29 C.F.R. § 1926.501(b)(1)

The Secretary in Citation No. 1, Item 1, alleges that:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:
>
> > On or about 09/11/03, at the Patton Creek jobsite, an employee was not using any fall protection system, exposing him to a fall of 65 feet.

The standard at 29 C.F.R. § 1926.501(b)(1) provides:

> (b)(1) *Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

The cited standard is clearly applicable. At this jobsite the Respondent's employees were engaged in construction activities subject to the provisions of this standard.

Mr. Olvera, the Respondent's foreman of a three-man crew, worked on the slope, a walking/working surface, laying grass matting. At the end of the slope, there was an unprotected edge or side, 65 feet above the next lower ground level. The evidence clearly establishes that no guardrail system or safety net system was in place to protect employees from falling 65 feet from the sloped surface. Mr. Olvera was observed and photographed working near the lower edge of the slope within the zone of danger; and, therefore, he was exposed to falling 65 feet. The result of such a fall would certainly be death or serious physical injury including broken bones and internal injuries.

Photographic evidence and testimony of Mr. Cooley, as well as that of Mr. Olvera, established that Mr. Olvera worked on the slope without any personal fall arrest system or other form of personal fall protection. While conflicting evidence was presented as to the duration of Mr. Olvera's unprotected exposure to a 65-foot fall, and the circumstances of that exposure, evidence established: that the terms of the standard were not complied with; and, that Mr. Olvera was exposed to the hazard of falling 65 feet without any form of fall protection.

The Respondent had knowledge of this violation. It knew, or with the exercise of reasonable diligence could have known, of the violative condition. Mr. Olvera, the Respondent's foreman, knew that he was working on this slope, exposed to 65-foot fall with no fall protection. His knowledge of this condition, as a

foreman of the three-man Yates crew, is imputed to the Respondent. Mr. Cooley testified that Mr. Olvera worked on this slope without fall protection for at least 15 to 20 minutes. Mr. Olvera testified that he was the Respondent's foreman on this job. He admitted that he was on the slope, but claimed to have been there only five minutes. He testified that he knew he was not to be on the slope without being tied off.

I find that Mr. Cooley's testimony as to the duration of Mr. Olvera's exposure to be credible. He observed Mr. Olvera on the slope from a distance. He then cautiously approached the slope so as not to startle the exposed employee, and photographed Mr. Olvera and his crew continuing to work on the same slope at least 15 minutes later. Mr. Olvera's testimony was merely an unsubstantiated claim that he was on the slope about five minutes. He gave no credible basis for that claim. No other testimony was produced in support of that claim. His testimony on the duration of his exposure lacks credibility.

Joe Holyfield, the Respondent's project manager, testified that Mr. Olvera was the Respondent's foreman and that Mr. Olvera directed the work of the crew. Mr. Holyfield further testified that Mr. Olvera took instructions from him and had his crew follow those instructions. Mr. Olvera, according to Mr. Holyfield, had training on fall hazards. Given Mr. Olvera's position, responsibilities on this job, and training on fall hazards, his knowledge is clearly imputed to his employer, Yates.

The Secretary has produced sufficient evidence to establish a serious violation of 29 C.F.R. § 1926.501(b)(1).

Alleged Serious Violation of 29 C.F.R. § 1926.502(a)(2)

The Secretary in Citation No. 1, Item 2, alleges that:

> Employers shall provide and install all fall protection systems required by this subpart for employee, and shall comply with all other pertinent requirements of this subpart before that employee begins the work that necessitates the fall protection.
>
> On or about 9/11/03, at the Patton Creek jobsite, the fall arrest system being used did not meet the criteria in that:
>
> 1. Employees were exposed to the hazard of falls prior to beginning work.
> 2. The cable system being used was not properly rigged.
> 3. Employees were wearing their full body harnesses backwards.
> 4. The keys to vehicles which were being used as anchor points were left in the ignitions, allowing the vehicles to be driven off, and were not chocked to prevent their rolling.

The standard at 29 C.F.R. § 1926.502(a)(2) provides:

> (2) Employers shall provide and install all fall protection systems required by this subpart for an employee, and shall comply with all other pertinent requirements of this subpart before that employee begins the work that necessitates the fall protection.

This standard requires, in part, that employers comply with all pertinent requirements of Subpart M – Fall Protection. The most readily apparent deficiency in the Respondent's fall protection system on this slope occurred when two Yates employees, at the direction of their foreman, wore their safety harnesses backwards while working on the slope, while exposed to a fall of 65 feet.

The Subpart M standard at 29 C.F.R. § 1926.502(d)(17) provides:

> (17) The attachment point of the body belt shall be located in the center of the wearer's back. The attachment point of the body harness shall be located in the center of the wearer's back near shoulder level, or above the wearer's head.

It is undisputed that two employees in Mr. Olvera's crew asked Mr. Olvera for permission to wear their harnesses backwards with the D-ring attachment points located in front of their chests rather than in the center of their backs.

Mr. Cooley, the Secretary's compliance officer, convincingly testified and demonstrated at the hearing that the employees could roll out of the harness, be hung or break their necks when the D-ring attachment is worn in front of the chest, rather than on the wearer's back, as required by the standard.

Mr. Olvera told the two employees in his crew to wear the harnesses backwards so they could reach the bottom of the slope to perform their work. The lanyards provided by Yates were not long enough to allow these employees to wear the harnesses properly and reach their work. The Respondent, through Mr. Olvera, its foreman, substituted its judgment for the requirements of the standard regarding the location of the D-ring attachment point of the body harness. Such substitution of judgment constitutes noncompliance with the terms of the standard. These employees wore these harnesses backwards on this slope, for at least 45 minutes while exposed to a 65-foot fall, and with the full knowledge and consent of their foreman, Mr. Olvera.

This was obviously not a departure from ordinary practice by the Respondent's employees. Mr. John O. Ray, the Respondent's superintendent of dirt movement, admitted during the inspection that these employees wore the harnesses backwards to make the work easier. At least two supervisory employees, foreman Olvera and superintendent Ray, knew of and accepted the practice of wearing the harnesses backwards.

This practice, standing alone, constitutes a serious violation of 29 C.F.R. § 1926.502(a)(2). Further discussion of the three additional practices which allegedly violated the standard is, therefore, not necessary to render a complete and effectual decision relating to this violation.

Alleged Unpreventable Employee Misconduct

In its answer, the Respondent alleged that the violative conditions were the result of isolated instances of employee misconduct of which the Respondent had no knowledge. At the hearing, the Secretary moved to strike the Respondent's defense of employee misconduct as to Citation No. 1, Item 2. That motion was granted. While the Respondent's answer was sufficient to raise the defense as to Items 1 and 2, it failed to pursue that defense as to Item 2 in its response to the Secretary's interrogatory No. 2 (Exh. C-28), and in its prehearing statement. Allowing the Respondent to assert this defense at this hearing would be prejudicial to the Secretary. In its prehearing statement, the Respondent limited its employee misconduct defense to Item 1. In its interrogatory response, Yates also addressed only the violative conditions in Item 1.

The Respondent abandoned this defense as to Item 2 by its discovery responses and its prehearing statement. The Secretary was prejudiced by this conduct and would, therefore, be unable to meet this

defense. Under Rule 37 of the Federal Rules of Civil Procedure an incomplete response to an interrogatory is treated as a failure to respond. The appropriate sanction under Rule 37 is to strike the applicable portion of the pleadings. Here, that portion of th [sic] Respondent's answer asserting employee misconduct is stricken as it relates to the allegations found in Item 2 of Citation No. 1.

The Commission has established a four-part test for the unpreventable employee misconduct defense. To establish the affirmative defense of unpreventable employee misconduct, an employer must show: that it has established work rules designed to prevent the violation, has adequately communicated these rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered. *Jensen Construction Co.*, 7 BNA OSHC 1477 (No. 76-1538, 1979).

Martin Olvera supervised and directed the work activities of his crew and had responsibility for their safety. This crew varied in size between two and seven employees. He has given employees safety warnings and has removed employees from jobs for working unsafely. An employee, such as Olvera, who had been delegated authority over the Respondent's employees, is a supervisor for the purpose of imputing knowledge to an employer. *Structural Building Systems, Inc.*, 20 BNA OSHC 1773, at 1775 (No. 03-0757, 2004).

The Respondent asserts that any violation of 29 C.F.R. § 1926.501(b)(1) was a result of unpreventable employee misconduct by its foreman, Mr. Olvera.

The Respondent has a general written rule that a body harness and lanyard must be worn when working at a height of 6 feet or more above an unguarded or unsecured working surface (Exh. R-1).

Charles Maness, the Respondent's safety director, testified as to Yates' training program. He claimed the provisions for fall protection were site-specific. A review of this program shows that it is general in nature and is not specific to this or any other jobsite. He testified generally that safety was the responsibility of each manager. In addition to orientation of newly hired employees, Yates conducts regular safety meetings at least once a week.

Here, a supervisory employee failed to utilize fall protection on a sloped surface, exposed to a 65-foot fall. The defense of unpreventable employee misconduct is difficult to prove, since it is Mr. Olvera's duty to protect the employees under his supervision. His involvement in the misconduct is strong evidence that Yates' safety program is lax.

Mr. Olvera admitted that he failed to wear a safety harness while working on the slope and attempted to justify his actions based on the short duration of exposure. He also stated that he had not anticipated returning to the slope after leaving the area. His testimony showed a lack of understanding and appreciation for the need of fall protection in this

area. Further evidence of this is the fact that he gave specific permission to his two crew members to wear their harnesses backwards while working on this slope for over 45 minutes.

John Ray, the Respondent's dirt supervisor on this job, testified that wearing harnesses backward allowed easier performance of the work to be done by the employees. This further shows lack of understanding by supervisors of fall protection needs on this site.

During the inspection, Mr. Olvera identified Mr. Ray as his supervisor. Mr. Ray participated during the inspection as the supervisor of the operation. In its discovery response, the Respondent, through counsel, identified John Ray as the supervisor of this operation (Exhs. C-28, C-29). Only at the hearing did the Respondent's witnesses (Holyfield, Olvera and Ray) suggest that Holyfield, not Ray, was Olvera' s supervisor. I find the testimony inconsistent with the previous statements and admissions, and find the testimony of all three not to be credible on this point.

Mr. James Cooley, the Secretary's compliance officer who inspected this site, testified about Mr. Olvera's exposure and his response when questioned about his failure to wear a harness. The following is part of that testimony:

> **A:** The standard requires that each employee on a walking/working surface, both horizontal and vertical, with an unprotected side or edge, which is six feet or more above

a lower level was not protected from falling by use of a guardrail system, a safety net system or personal fall arrest system.

Q: How many of those systems was Mr. Olvera using?

A: There was only one in place.

Q: He, himself, was he using anything?

A: He, himself, wasn't using anything.

Q: Okay. Now, you had a conversation with him; correct?

A: Yes, sir.

Q: What did he tell you about this?

A: He stated that he had gone to use the bathroom just a few minutes prior and had taken his harness off and lanyard and went to use the bathroom and just forgot to put it back on.

Q: To what extent – excuse me – to what extent did you conclude that that story was the truth?

A: We couldn't ascertain that it was the truth.

Q: Why is that?

A: Upon walking from one side of the job-site to the other, a third harness and lanyard were not found anywhere, either in the cabs of the front-end loader or the bulldozer or anywhere within the area – the work area.

Q: Did he ever mention where it was?

A: He never mentioned where it was.

Q: Okay. How long did you observe him working without a harness?

A: As I stated before, approximately 15 to 20 minutes prior to our arrival at the job site.

Q: So, is this from time that you noticed it or is this while walking approaching the site?

A: Yes, sir.

Q: Now, what did Mr. Olvera do to respond to this violation?

A: We asked Mr. Olvera where his harness and lanyard were and he never answered our question. Also, while I was taking photographs of the way that the anchor, horizontal anchor line was being used and placed, I noticed that one of the individuals in the short-sleeved shirt with the blue hard hat on, physically took his harness off, as shown in photograph C-20. And while observing that, I noticed that that individual in the short-sleeved blue shirt gave it to the individual in the checkered shirt, who then gave it to Mr. Olvera, who put it on. And, meanwhile, the individual in the short-sleeved shirt walked away from the jobsite never to return.

(Tr. 60-61).

When questioned about his reasons for putting on a crew member's harness, Mr. Olvera testified that he was testing it and that John Ray told him the harness was too loose. John Ray could not have told him this, because he arrived at this area after Mr. Olvera put on the harness, as Mr. Cooley testified. Mr. Olvera testified that he had placed his harness in his truck when he went to the bathroom. Mr. Olvera's truck was in the immediate area of the slope. When asked for his harness he did not retrieve his equipment from the truck and did not tell the inspectors where the harness was located. Mr. Olvera's testimony is not credible and is rejected.

Mr. Olvera's lack of appreciation and understanding of the need for appropriate fall protection is shown, not only by his failure to wear a safety harness on this slope, but also by permitting and directing two employees under his supervision to wear their harnesses backwards for at least 45 minutes. Mr. Ray's lack of understanding of fall protection requirements is shown by his acceptance and validation of the practice of wearing harnesses backwards as making the employees' work easier.

All employees involved, including two supervisory employees, failed to follow fall protection requirements. This demonstrates a lack of understanding which is a direct result of a breakdown in communication of any safety rules that might have been issued by the Respondent. It also demonstrates a lax safety program.

Mr. Ray testified that he inspected this site twice on the day of the OSHA inspection. Mr. Ray could not have found obvious fall hazards as he did not recognize or understand the hazard of employees wearing harnesses backwards. The inspections were inadequate attempts to discover violations by the Respondent. An individual must first know what is a violation before he can determine whether one exists at any given time.

The Respondent's disciplinary program was also flawed and inconsistent. Mr. Olvera was given a written warning for failing to wear fall protection while working on the slope on September 11, 2003. Neither he nor the two employees in his crew, however, were given warnings, reprimands or suspensions for improper wearing of the safety harnesses. No mention of this condition was even made in Mr. Olvera's warning letter (Exh. R-4). This suggests ineffective enforcement.

The above demonstrates a lax safety program which was not effectively communicated or enforced. See *Structural Building Systems Inc., supra.*

The Fifth Circuit has recognized the need to demonstrate effective communication and enforcement of company work rules to prove the defense of unpreventable employee misconduct. *H. B. Zachry Co. v. OSHRC,* 638 F.2d 812, at 819 (5th Cir., Unit A, March 2, 1981); *Floyd S. Pike Electrical Contractors, Inc. v. OSHRC,* 576 F.2d 1257 (5th Cir. 1978).

Both cases involved alleged employee misconduct. In *Pike, supra* at 77, the court stated:

> In view of the working foreman's obligation, not only to observe the rules, but to insure that the rules were observed by his men, the company's failure to make any further inquiry or take any further corrective action is particularly significant.
>
> > Because the behavior of supervisory personnel sets an example at the workplace, an employer has – if anything – a *heightened* duty to ensure the proper conduct of such personnel. Second, the fact that a foreman would feel free to breach a company safety policy is strong evidence that implementation of the policy was lax.
>
> *National Realty and Construction Co., Inc. v. O.S.H.R.A.C.,* 160 U.S.App.D.C. 133, 143, 489 F.2d 1257, 1267 n. 38 (1973). While OSHA does not require an employer to inscribe a safety regulation on parchment or chisel it in stone, neither does it permit him to treat the rule as if it were written in sand.

The Respondent failed to prove its defense of unpreventable employee misconduct.

Penalty Assessment

Section 17(j) of the Act requires that when assessing penalties, the Commission must give "due

consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. 19 U.S.C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.,* 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

Yates is an employer with approximately 6,000 employees. It has no history of violations, which were affirmed in the last three years.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation "depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J. A. Jones Construction Co.,* 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

This was a three-employee crew. The foreman had no fall protection, and was exposed to a 65-foot fall while working on a sloped surface for at least 15 to 20 minutes. He permitted and directed two employees in his crew to wear safety harnesses improperly while working on the same slope for at least 45 minutes. If these employees fell from the slope, the likely result would be death or serious physical injury. Based on these factors, a penalty of $5,000.00 is assessed for the violation of 29 C.F.R.

§ 1926.501(b)(1), and a penalty of $4,000.00 is assessed for the violation of 29 C.F.R. § 1926.502(a)(2).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Citation No. 1, Item 1, alleging a serious violation of 29 C.F.R. §1926.501(b)(1) is affirmed and a penalty of $5,000.00 is assessed.

2. Citation No. 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.502(a)(2) is affirmed and a penalty of $4,000.00 is assessed.

/s/ Stephen J. Simko, Jr.
STEPHEN J. SIMKO, JR.
Judge

Date: December 10, 2004

No. 07-606

In the Supreme Court of the United States

JOHN CARLO, INC., PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

GREGORY F. JACOB
Solicitor of Labor

JOSEPH M. WOODWARD
Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the determination by the Occupational Safety and Health Review Commission that petitioner, a corporation engaged in the business of installing sewer and water lines, had committed a willful violation of a regulation promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, is supported by substantial evidence and otherwise in accordance with the law.

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In the Supreme Court of the United States

No. 07-606

JOHN CARLO, INC., PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is reprinted in 234 Fed. Appx. 902. The Notice of Final Order of the Occupational Safety and Health Review Commission (Pet. App. 44-45) is unreported. The decision and order of the administrative law judge (Pet. App. 6-43) is reported at 2005 O.S.H. Dec. (CCH) ¶ 32,834.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2007. A petition for rehearing was denied on August 7, 2007 (Pet. App. 46-47). The petition for a writ of certiorari was filed on November 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. 651 *et seq.* requires that a covered employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. 654(a)(1). A covered employer must also "comply with occupational safety and health standards" promulgated by the Secretary of Labor (Secretary). 29 U.S.C. 654(a)(2); see 29 U.S.C. 655 (directing Secretary to promulgate such standards).

The Secretary enforces these OSH Act statutory and regulatory requirements by conducting inspections and investigations, 29 U.S.C. 657, and issuing citations, 29 U.S.C. 658. In all citations, the Secretary is required to "fix a reasonable time for the abatement of the violation." 29 U.S.C. 658(a). The citation may also propose various civil penalties depending on the nature of the cited conduct. 29 U.S.C. 666.[1] "[A] civil penalty of up to $7,000" is authorized for each "serious violation." 29 U.S.C. 666(b). The Act provides that "a serious violation" exists

> if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment

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[1] The Act authorizes criminal penalties, including up to six months of imprisonment and a fine of not more than $10,000 in situations where an employer's "willful[] violat[ion of] any standard, rule, or order promulgated" by the Secretary "cause[s] death to any employee." 29 U.S.C. 666(e).

> unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

29 U.S.C. 666(k). The OSH Act provides for further enhanced penalties in cases involving a "willful[]" violation: "Any employer who willfully or repeatedly violates" the statute or the Secretary's regulations "may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation." 29 U.S.C. 666(a). A violation is "willful" if it is "committed with intentional, knowing or voluntary disregard for the requirements of the Act, *or* with plain indifference to employee safety." *Continental Roof Sys., Inc.*, 18 O.S.H. Cas. (BNA) 1070, 1071 (1997); accord *Lakeland Enters. of Rhinelander, Inc.* v. *Chao*, 402 F.3d 739, 747 (7th Cir. 2005); *AJP Constr., Inc.* v. *Secretary of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004).

An employer who receives a citation "has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty." 29 U.S.C. 659(a). If the employer gives such notice, the Secretary must notify the Occupational Safety and Health Review Commission (Commission), 29 U.S.C. 659(c), an independent agency whose members are appointed by the President with the advice and consent of the Senate, 29 U.S.C. 661(a) and (b). The matter is then assigned to a Commission-appointed administrative law judge (ALJ), 29 U.S.C. 661(j), who must "afford an opportunity for a hearing" and "issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty." 29 U.S.C. 659(c). Unless a member of the Commission "direct[s] that such report shall be reviewed by the Commission," the ALJ's order "become[s] the final order of the Com-

mission" 30 days after it is issued. 29 U.S.C. 666(j); see 29 C.F.R. 2200.91 (describing procedures for petitions for discretionary review of an ALJ's decision). "Any person adversely affected or aggrieved by an order of the Commission" may, in turn, file a petition for review with an appropriate court of appeals. 29 U.S.C. 660(a); see also 29 U.S.C. 660(b) (providing that Secretary may also obtain review or enforcement of final Commission order).

2. Petitioner is a corporation that was hired to install a sewer line down the middle of an existing roadway. Pet. App. 7. The installation required petitioner's employees to work in a trench that had been dug 14.5 feet down into "Type C" soil. *Id.* at 7, 13; see 29 C.F.R. Pt. 1926, Subpt. P, App. A (defining Type C soil as soil that is granular, submerged, or otherwise lacking in compressive strength). Under those circumstances, the Secretary's regulations required petitioner to protect employees in the trench from cave-ins by either "shoring" or "sloping." Pet. App. 2, 13; see 29 C.F.R. 1926.652(a), (b) and (c). Shoring involves use of a structure to support the sides of a trench, whereas sloping means excavating at a prescribed angle in order to prevent cave-ins. 29 C.F.R. 1926.650 (definitions of shoring and sloping).

By October or November of 2003, several months before the incident that gave rise to this proceeding, petitioner's general superintendent, John Solich, and its project superintendent, Lester Cox, had learned that the path of the excavation would cross under an existing gas line that ran perpendicular to the proposed sewer line. Pet. App. 2, 8, 30, 37. Solich and Cox unsuccessfully sought to have the owner of the gas line relocate it, and they met a number of times with other management

officials to discuss the situation. *Id.* at 2, 30, 37. At the conclusion of those meetings, Solich and Cox decided to defer further consideration of the problem until the work crew encountered the gas line. *Id.* at 37.

Petitioner's project foreman, James Jacobs, became aware of the gas line approximately three weeks before the accident that gave rise to this case occurred. Pet. App. 17. One week before the accident, foreman Jacobs discussed the situation with superintendent Cox, his immediate supervisor. *Id.* at 15-16, 17. The work crew had been shoring the 14.5 foot trench by using a 6-foot trench box stacked on top of an 8-foot trench box to support the trench's sides. *Id.* at 2, 13. Jacobs asked Cox "whether he had plans for how [the work crew was] to go under the gas line." *Id.* at 17. Cox responded that the crew would need to remove the trench boxes when they reached the gas line. *Id.* at 18. Cox also instructed Jacobs not to dig the trench wider than six feet. *Id.* at 18.

Two days before the accident, Jacobs and Cox discussed the gas line again. Pet. App. 18. Jacobs asked Cox whether Cox was "sure that's the way we need to do this?" *Ibid.* Cox responded: "Yes, pull the trenchbox." *Ibid.* Jacobs told Cox that the work crew would not be able to slope the trench to compensate for the absence of the trench boxes so long as they adhered to Cox's previous instruction to dig no wider than six feet. *Id.* at 19. Cox stated, "I understand that," and told Jacobs that petitioner "had bidded this job to be no wider than six foot." *Ibid.* Cox reiterated his instruction to remove the trenchbox later that same day, and in another conversation on the morning of the accident. *Id.* at 20.

Jacobs knew that complying with Cox's instructions would violate the requirements of the Act. Pet. App. 22.

But he did not discuss the issue with anyone else, "[b]ecause my job was to tell [Cox] and [Cox's] job was to go to the higher man. That's why we have a superintendent on the job." *Ibid.* Consistent with Cox's instructions, Jacobs told his crew not to slope the walls of the trench and to remove the top trench box when they reached the gas line. *Id.* at 20.

On March 31, 2004, foreman Jacobs removed the top trench box, pulled the lower box under the gas line, and directed two of petitioner's employees to enter the trench. Pet. App. 14. After the employees had been inside the trench for at least 20 minutes, a large clay ball dislodged, fell into the trench, and struck one of the employees, who eventually died from his injuries. *Id.* at 3, 13. After the cave-in, petitioner was able to slope the trench walls and complete the project without moving the gas line. *Id.* at 3, 9.

3. a. The Secretary cited petitioner for, *inter alia*, a willful violation of 29 C.F.R. 1926.652(a)(1), which states that "[e]ach employee in an excavation shall be protected from cave-ins by an adequate protective system." Pet. App. 12-13. Petitioner contested that citation, and a hearing was held before an ALJ during November 2005. *Id.* at 7.

b. On May 11, 2006, the ALJ issued a written decision and order (Pet. App. 6-43) that upheld the Secretary's citation for a willful violation of Section 1926.652(a)(1) of the regulations and assessed a civil penalty of $50,000. Pet. App. 7.[2]

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[2] In the same decision and order, the ALJ vacated a citation alleging that petitioner had violated a different section of the Secretary's regulations by failing to stack large concrete pipes in an appropriate manner. Pet. App. 11-12.

With respect to the existence of a violation, the ALJ noted that "the Secretary ha[d] the burden of proving"

> (a) the applicability of the cited standard, (b) the employer's non-compliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence could have known, of the violative conditions.

Pet. App. 11 (quoting *Atlantic Battery Co.*, 16 O.S.H. Cas. (BNA) 2131, 2138 (1994)). As for the first three requirements, the ALJ noted that the parties had "stipulated that the cited standard, 29 C.F.R. § 1926.652(a)(1) is applicable," Pet. App. 13, "that the trench was not in conformity with that standard," *ibid.*, and that "[a]fter the accident, [petitioner] was able to adequately slope the trench walls without moving the gas lines," *id.* at 14. As for the fourth requirement, employer knowledge, the ALJ determined that petitioner, "through its foreman, James Jacobs, had knowledge of the violative conditions at the worksite on * * * the day of the accident." *Ibid.*

The ALJ next concluded that the violation was "a serious violation in that there was a substantial probability that death or serious physical harm could result from the violative conditions." Pet. App. 14-15. "Without adequate protection by shoring or sloping," the ALJ explained, "employees working in this excavating were exposed to the hazard of cave-in of the walls of the excavation." *Id.* at 15.

The ALJ also determined that the violation was willful. Pet. App. 15-32. Because petitioner "is a corpora-

tion which acts through its agents," the ALJ stated that it was necessary to determine "the state of mind of its agents acting on its behalf." *Id.* at 15. After recounting the relevant testimony, *id.* at 16-27, the ALJ found that both superintendent Cox and foreman Jacobs were "actually aware, at the time of the violative act, that the act was unlawful," and that they had "knowingly and deliberately proceeded to expose employees to the hazards of cave-in of the excavation walls without protection of employees by shoring or sloping." *Id.* at 29.

The ALJ determined that this awareness on the part of Cox and Jacobs was properly attributable to petitioner. Foreman Jacobs "was the competent person on site and directed the work of the other employees," and superintendent Cox "directed and had responsibility for all work done by [petitioner's] employees on the project." Pet. App. 16; see *id.* at 29. Both Cox and Jacobs had undergone the "competent person training required by 29 C.F.R. Subpart P-Excavations," *ibid.*, which meant that they were "capable of identifying * * * working conditions which are * * * hazardous, or dangerous to employees" and had "authorization to take prompt corrective measures to eliminate them," *ibid.* (quoting 29 C.F.R. 1926.650(b)). The ALJ noted that petitioner "is in the business of digging trenches and other excavations," and that the standard violated here "sets forth the basic requirements to protect employees in excavations." *Id.* at 29-30. "The situation of the gas line crossing the path of the trench was not an unexpected situation," and "[t]op management officials * * * knew about this condition for several months prior to the accident." *Id.* at 30. The ALJ also concluded that petitioner's safety manual showed "a heightened awareness * * * of the hazards resulting from failure

to protect employees in trenches by shoring or sloping." *Id.* at 30-31. Under those circumstances, the ALJ concluded that petitioner's "actions show intentional disregard of the requirements of the Act and plain indifference to those requirements and to employee safety." *Id.* at 31.

The ALJ next rejected petitioner's argument that the violation should be excused because it "was the result of unpreventable employee misconduct" (Pet. App. 32) of either foreman Jacobs or superintendent Cox. *Id.* at 32-41.[3] To make out such a defense, the ALJ stated, petitioner would need to establish that: "(1) it has established work rules designed to prevent the violations, (2) it has adequately communicated these rules to its employees, (3) it has taken steps to discover violations, and (4) it has effectively enforced the rules when violations have been discovered." *Id.* at 32 (quoting *Jensen Constr. Co.*, 7 O.S.H. Cas. (BNA) 1477, 1479 (1979)). In addition, because Jacobs and Cox were "supervisory employees," the ALJ stated that "additional analysis [was] required" and that petitioner was required to "show that it took all feasible steps to prevent the accident." *Id.* at 35, 39 (citing *Archer-W. Contractors*, 15 O.S.H. Cas. (BNA) 1013 (1991) (*Archer-Western*), petition for review denied, 978 F.2d 744 (D.C. Cir. 1992) (Table)); see *Archer-Western*, 15 O.S.H. Cas. at 1017 ("[S]ince it is the supervisor's duty to protect the safety of employees under his supervision[,] * * * [a] supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax.").

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[3] The ALJ also rejected petitioner's contention that the accident was the result of unpreventable misconduct by Comer Lindley, the deceased employee. Pet. App. 33. That issue is not before this Court. Pet. i.

Applying those principles, the ALJ concluded that the supervisors' actions did not constitute unpreventable employee misconduct. Foreman Jacobs had "specifically followed the direct orders of Cox," who was both Jacobs's "direct supervisor" and "the only superintendent and [petitioner's] highest ranking supervisor on this project." Pet. App. 34. Cox, in turn, "supervised all crews in all areas of the project," "met with the foreman * * * and visited the crews daily, dealing with problems and compliance with safety and other regulations," and "had full authority to stop work and to hire and fire employees." *Ibid.* In addition, the ALJ determined that petitioner's safety manual "contained material errors as to [the Secretary's] trenching requirements regarding the appropriate degree of sloping for Type C soil * * * and the minimum height of a trench box above surrounding soil." *Id.* at 35. By failing to correct "these obvious errors or communicate the correct information to employees on the project prior to the accident," the ALJ stated, petitioner had "failed to establish specific work rules designed to prevent this violation." *Id.* at 35-36. The ALJ similarly found that Cox and Jacobs had not "received adequate safety training by [petitioner]," even though "they were responsible for communicating safety information to [other] employees," and that although "[e]mployees were given copies of [petitioner's] safety manual, * * * no effort was made to assure the employees understood its contents." *Id.* at 36.

The ALJ also found that petitioner's disciplinary system was "ineffective * * * on this project," and that although petitioner had fired Cox and Jacobs after the accident, both had also received high performance evaluations after the accident, and the separation notices did not cite "'conduct' as the reason for discharge" and

stated that petitioner "would rehire both Cox and Jacobs." *Id.* at 38-39. The ALJ noted that petitioner's management was aware of the gas line problem but collectively decided to address the situation when it arose, and that petitioner presented no evidence that higher management supervised or questioned superintendent Cox's handling of the situation. *Id.* at 37, 40-41. Under those circumstances, the ALJ found that petitioner "ha[d] failed to prove its defense that the willful violation of 29 C.F.R. § 1926.652(a)(1) was the result of unpreventable employee misconduct." *Id.* at 41.

c. Petitioner filed a petition for discretionary review with the Commission. Supp. C.A. R.E. tab 8; see 29 C.F.R. 2200.91. In its petition for discretionary review, petitioner stated: "When a supervisory employee has actual or constructive knowledge of the violative condition, the knowledge of that employee can be imputed to the employer. However, the employer can rebut the imputed knowledge by showing that the employer 'took reasonable measures to prevent the occurrence of the violation.'" Supp. C.A. R.E. tab 8, at 3 (citation omitted); see *id.* at 4 ("the issue before the ALJ was whether [petitioner] took reasonable measures to prevent the occurrence, thereby rebutting the knowledge imputed through foreman Jacobs").

On June 26, 2006, the Commission issued a Notice of Final Order stating that the case had not been selected for review and that the ALJ's order thus constituted the final order of the Commission. Pet. App. 44-45.

4. The court of appeals denied a petition for review and affirmed the Commission's order in an unpublished per curiam opinion. Pet. App. 1-5. After summarizing the facts and the ALJ's decision, *id.* at 2-5, the court stated that the ALJ's factual findings "are deemed con-

clusive" so long as they "are supported by substantial evidence" and that a reviewing court must "uphold the Commission's legal determinations unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* at 5 (quoting *J.A.M. Builders, Inc.* v. *Herman*, 233 F.3d 1350, 1352 (11th Cir. 2000)); see 29 U.S.C. 660(a); 5 U.S.C. 706(2)(A). Applying those standards, the court of appeals determined "that substantial record evidence supports the ALJ's findings and the decision is in accordance with the law." Pet. App. 5.

ARGUMENT

Petitioner contends (Pet. i) that this Court should grant review to decide whether the Secretary may "establish knowledge [of a violation] by imputing to the employer as a matter of law the knowledge of a supervisor who intentionally violates the Act and the employer's work rules without proving the supervisor's misconduct was foreseeable to the employer." The courts of appeals have reached different conclusions regarding whether the Secretary or the employer bears the burden of proving that an OSH Act violation was the result of unforeseeable employee misconduct, as well as whether and under what circumstances the actual or constructive knowledge of a supervisory employee may be charged to the employer itself.[4] As the Secretary argued in unsuc

[4] Most of the courts of appeals require the Secretary to prove that the employer knew or could have known of the violation, contrary to the Secretary's position that she bears the burden regarding employer knowledge only where she alleges a willful violation. See, *e.g.*, *New York State Elec. & Gas Corp.* v. *Secretary of Labor*, 88 F.3d 98, 107 (2d Cir. 1996) (*New York State Elec.*). Most courts, however, allow the Secretary to prove knowledge by imputing the actual or constructive knowledge of a supervisor to the employer, at least when a non-supervisory

cessfully seeking review of the Fourth Circuit's decision in *L.R. Willson & Sons, Inc.* v. *OSHRC*, 134 F.3d 1235 (4th Cir.), cert. denied, 525 U.S. 962 (1998), and in opposing review for case-specific reasons in *Brock* v. *L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir.), cert. denied, 484 U.S. 989 (1987), questions concerning the proper allocation of various burdens of persuasion are fundamental to the Secretary's enforcement of occupational safety and health standards. See Pet. at 15-17, *Herman* v. *L.R. Willson & Sons, Inc.*, 525 U.S. 962 (1998) (No. 98-188); Br. in Opp. at 7, *L.E. Myers Co., High Voltage Div.* v. *Secretary of Labor.*, 484 U.S. 989 (1987) (No. 87-246). Accordingly, this Court's review may be necessary in an appropriate case to clarify the relevant burdens on the Secretary and the employer in situations in which an employer asserts that a particular violation of safety

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employee commits the violation. See, *e.g.*, *W.G. Yates & Sons Constr. Co.* v. *OSHRC*, 459 F.3d 604, 609 n.7 (5th Cir. 2006) (*W.G. Yates*); *Danis-Shook Joint Venture XXV* v. *Secretary of Labor*, 319 F.3d 805, 812 (6th Cir. 2003) (*Danis-Shook*); *New York State Elec.*, 88 F.3d at 105, 109-110; *Mountain States Tel. & Tel. Co.* v. *OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980) (*Mountain States*). If the Secretary meets her initial burden, the employer may then present an affirmative defense of unpreventable employer conduct. See, *e.g.*, *D.A. Collins Constr. Co.* v. *Secretary of Labor*, 117 F.3d 691, 695 (2d Cir. 1997), and cases cited. The Fourth Circuit, however, does not impute a supervisor's knowledge to the employer and instead requires the Secretary to prove that a violation was not the result of unpreventable employee misconduct. See, *e.g.*, *L.R. Willson & Sons, Inc.* v. *OSHRC*, 134 F.3d 1235, 1240-1241 (4th Cir.), cert. denied, 525 U.S. 962 (1998). And the Third, Fifth, and Tenth Circuits do not impute a supervisor's knowledge of a violation when the supervisor commits the violation, unlike the Sixth Circuit, which allows imputation in those circumstances. Compare *W.G. Yates*, 459 F.3d at 607-608; *Pennsylvania Power & Light Co.* v. *OSHRC*, 737 F.2d 350, 357-358 (3d Cir. 1984); *Mountain States*, 623 F.2d at 158, with *Danis-Shook*, 319 F.3d at 812.

rules was the result of unforeseeable or unpreventable employee misconduct.

This case, however, would not be a suitable vehicle for addressing the existing tensions in lower court authority. Petitioner forfeited the ability to obtain judicial review of its claim that a supervisor's knowledge of his own misconduct may not be imputed to his employer by expressly espousing a contrary position before the Commission. Moreover, the court of appeals' per curiam decision is unpublished and non-precedential. In any event, the approach followed by the ALJ in this case is both reasonable and correct, and petitioner would not prevail even under its own proposed rule. Further review is not warranted.

1. The OSH Act expressly provides that "[n]o objection that has not been urged before the Commission shall be considered by the court [of appeals on review of a Commission decision], unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. 660(a); see *Keystone Roofing Co.* v. *OSHRC*, 539 F.2d 960, 963-964 (3d Cir. 1976) (holding that an objection is not "urged before the Commission" within the meaning of Section 660(a) unless it is pressed in a petition for discretionary review). Petitioner did not argue in its petition for discretionary review to the Commission that the Act "expressly prohibit[s] knowledge imputation in supervisory misconduct cases," Pet. 9, or that doing so "impermissibly shifts the burden of proof," Pet. 11. To the contrary, the petition for discretionary review *acknowledged* that "[w]hen a supervisory employee has actual or constructive knowledge of the violative condition, the knowledge of that employee *can* be imputed to the employer," and that it is the *employer's* task to "*rebut*" that imputation

of knowledge by showing that it took reasonable measures to prevent the occurrence of the violation. Supp. C.A. R.E. tab 8, at 3 (emphases added). Petitioner has not attempted to identify an "extraordinary circumstance[]," 29 U.S.C. 660(a), that would excuse its failure to raise its current argument before the Commission, nor did it attempt to do so before the court of appeals. Because the petition for discretionary review did not "convey[] the substance of [petitioner's current contention] face up and squarely, in a manner reasonably calculated to alert the Commission to the crux of the perceived problem," petitioner may not raise that contention as a basis for setting aside the Commission's decision. *P. Gioioso & Sons, Inc.* v. *OSHRC*, 115 F.3d 100, 107 (1st Cir. 1997); see *Frank Lill & Son, Inc.* v. *Secretary of Labor*, 362 F.3d 840, 844 (D.C. Cir. 2004); *D.A. Collins Constr. Co.* v. *Secretary of Labor*, 117 F.3d 691, 694-695 (2d Cir. 1997).

2. Further review is also unwarranted because the court of appeals' brief per curiam opinion is unpublished and non-precedential, and it is far from clear that the court of appeals adopted the approach petitioner attempts to ascribe to it. Contrary to petitioner's assertions, the court of appeals did not state that "the ALJ *properly* imputed [the supervisors'] actual knowledge of the violation to [Petitioner]." Pet. 5 (emphasis added and other emphasis deleted); see Pet. 17 (asserting that "[the Eleventh Circuit] imputed the supervisors' knowledge of their own misconduct to [p]etitioner as a matter of law"). The actual sentence from the court of appeals' opinion is: "The ALJ imputed Jacobs' actual knowledge of the violation to [petitioner]," and that sentence is contained in the portion of the court of appeals' decision that summarizes the ALJ's decision. Pet. App. 4. The

same is true of the court of appeals' statement, quoted in part in the petition for a writ of certiorari (at 5), that: "The ALJ also determined that the violation was willful and held that [petitioner], 'through Cox and Jacobs, was actually aware, at the time of the violative act, that the act was unlawful." Pet. App. 4 (quoting *id.* at 29).

The only statement clearly denominated as a holding in the court of appeals' brief decision in this case—which resolved all four of the arguments raised by petitioner in its petition for review, see Pet. C.A. Br. 1—is the following sentence:

> After carefully considering the briefs, reviewing the record on appeal, and having had the benefit of oral argument, we find that substantial record evidence supports the ALJ's findings and the decision is in accordance with law.

Pet. App. 5. It is true that the court of appeals did not express disagreement with any of the ALJ's reasoning—including the ALJ's conclusion that it was appropriate to impute superintendent Cox's and foreman Jacobs's knowledge of their own misconduct to petitioner, which the court of appeals had described earlier in its opinion. But the court of appeals did not expressly endorse all facets of the ALJ's reasoning either, and there were other bases upon which it may have resolved the supervisor-knowledge issue.

Although the court of appeals did not refer to 29 U.S.C. 660(a) in its brief opinion, the government had argued the forfeiture point, discussed above, extensively in its brief. See Gov't C.A. Br. 33-39. It is possible, therefore, that the court of appeals concluded that the ALJ's decision was "in accordance with the law" (Pet. App. 5) with respect to the supervisor-knowledge issue

because petitioner had forfeited the entitlement to contend otherwise. It is also possible that the court of appeals chose not to resolve the forfeiture issue, because it concluded that any possible error on the supervisor-knowledge issue was harmless. See Gov't C.A. Br. 30, 45-47 (arguing that, on the facts of this case, it did not matter which party bore the burden of proof with respect to the foreseeability of the misconduct); see also pp. 17-19, *infra*. But regardless of what the court of appeals did, or did not, decide in this particular case, its unpublished and unelaborated decision will not supply a rule of decision for future cases, and it thus does not commit the Eleventh Circuit to a course that conflicts with the decisions of any other court of appeals.

3. This case would also be an inappropriate vehicle because the ALJ's decision makes clear that resolution of the issue on which petitioner seeks review—that is, whether the Secretary or petitioner bore the burden of proof with respect to whether the violation of safety rules in this case was "foreseeable" (Pet. i)—makes no difference to the outcome of this case. Petitioner expressly acknowledges that "[w]hether a violation is foreseeable requires analysis of an employer's safety policy, training, and discipline," and that "[i]f an employer's safety training and supervision are inadequate, *the law deems a violation to be foreseeable.*" Pet. 8 (emphasis added). Here, the ALJ's findings in rejecting petitioner's unpreventable employee misconduct defense conclusively establish that the supervisory misconduct at issue here was entirely foreseeable. See *W.G. Yates & Sons Constr. Co.* v. *OSHRC*, 459 F.3d 604, 609 n.7 (5th Cir. 2006) (stating that "the required considerations for th[e unpreventable misconduct] affirmative defense closely mirror the foreseeability analysis required to

determine if a supervisor's knowledge of his own misconduct, contrary to the employer's policies, can be imputed to the employer"); *New York State Elec. & Gas Corp.* v. *Secretary of Labor*, 88 F.3d 98, 106 (2d Cir. 1996) ("This question [of employer knowledge] is, in substance, the same as the one presented when the employer invokes the unpreventable misconduct defense.").

In this case, the ALJ expressly found that petitioner's written safety policies contained no less than *nine* "obvious errors," and that the errors regarding the degree of necessary sloping and the required height for trench boxes meant that petitioner had "failed to establish specific work rules designed to prevent this violation." Pet. App. 35-36. Petitioner's own safety director admitted that neither foreman Jacobs nor superintendent Cox had "receive[d] total training as of the accident date," even though "they were responsible for communicating safety information to [other] employees," and the ALJ also found that although "[e]mployees were given copies of [petitioner's] safety manual, * * * no effort was made to assure the employees understood its contents." *Id.* at 36. As for discipline, petitioner presented "[n]o evidence" that its "management on this project issued anything other than verbal warnings to employees for safety violations prior to" the day of the accident, *id.* at 38, and the ALJ found that petitioner's decision to give Cox and Jacobs high performance evaluations *after* the accident and to recite non-cause-based reasons for their termination was "totally inconsistent with [petitioner's] claim that it adequately enforced its safety program and rules," *id.* at 39. Finally, as for supervision, petitioner's top management had been aware of the existence of the gas line months before the accident, and had made a considered decision "to deal with the problem

when it actually arose," *id.* at 37, and petitioner presented "[n]o evidence" that "anyone in [its] upper management supervised or questioned [superintendent] Cox's handling of the situation," *id.* at 40-41.

Based on those findings, many of which were made based on concessions by petitioner's own witnesses or the absence of any evidence to the contrary, it is clear that the outcome in this proceeding would have been the same even if the ALJ had required the Secretary to demonstrate that the violation of safety requirements that occurred here was foreseeable. Cf. *N&N Contractors, Inc.* v. *OSHRC*, 255 F.3d 122, 127 (4th Cir. 2001) (stating that because "the Commission opinion indicates that the constructive knowledge inquiry did not turn on burden of proof rules, * * * even if the Commission had impermissibly shifted the burden the error would be harmless").

4. Further review in this particular case is also unwarranted because the ALJ's analysis here was both reasonable and correct. The Act itself does not state how the Commission is to determine whether an employer has "willfully * * * violate[d]" a safety standard, 29 U.S.C. 666(a), and the statute's definition of "serious violation" does not specify how the Commission is to determine whether "*the employer* did not, and could not with the exercise of reasonable diligence, know of the presence of the violation," 29 U.S.C. 666(k) (emphasis added). Because petitioner is a corporation—and thus may act only through its agents and be said to "know of" something in the sense that its agents "know of" it—the proper question is *which* of petitioner's agents are sufficiently identified with petitioner such that their actions and knowledge are properly attributable to the corporation. And although petitioner asserts

(Pet. 12-13) that holding employers responsible for the knowingly wrongful acts of their supervisory employees would frustrate Congress's purpose of "stimulat[ing] employers * * * to institute new and to perfect existing programs for providing safe and healthful workplace conditions," 29 U.S.C. 651(b)(1), such a rule would actually provide the appropriate incentives to hire supervisors who will not engage in knowing misconduct in the first place.

Nothing in the statute, the regulations, or common sense suggests that it was unreasonable for the ALJ to hold petitioner responsible for the knowing and deliberate violation of safety standards that was personally ordered by superintendent Cox, "the only superintendent and [petitioner's] highest ranking supervisor on this project," Pet. App. 34, and personally overseen by foreman Jacobs, the person who "directed the work" at the worksite and who "was the highest ranking supervisor at the trench at the time of the accident." *Id.* at 14-15. That is particular true in light of the "obvious" errors in petitioner's safety manual, *id.* at 35, its failure to provide proper training, *id.* at 36-37, and the considered decision by petitioner's general superintendent to permit the site team "to deal with the problem [of the gas line] when it actually arose," *id.* at 37. Imposing liability in such a case does not amount to "a de facto policy of strict liability in supervisory misconduct cases," Pet. 14, or mean that the unpreventable employee misconduct defense is "illusory," Pet. 16.[5] Rather, it appropriately

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[5] The Commission has issued a number of decisions finding no liability in situations where the violation was committed by a supervisory employee. See *Aquatek Sys., Inc.*, 2005 O.S.H. Dec. (CCH) ¶ 32,794, at 52,442 (2006); *Westar Energy, Inc.*, 20 O.S.H. Cas. (BNA) 1736, 1738-1742 (2004) (digest); *Field & Assocs. Inc.*, 19 O.S.H. Cas.

recognizes that the carefully considered and flagrant misconduct by various company officials in the chain of supervision for the project provides particularly "strong evidence that the employer's safety program was lax." *Archer-Western*, 15 O.S.H. Cas. (BNA) at 1017.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

GREGORY F. JACOB
Solicitor of Labor

JOSEPH M. WOODWARD
Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

JANUARY 2008

(BNA) 1387, 1393-1394 (2001) (digest); *Asplundh Tree Expert Co.*, 7 O.S.H. Cas. (BNA) 2074, 2075, 2080 (1979).

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No. 07-606

In The
Supreme Court of the United States

JOHN CARLO, INC.,

Petitioner,

v.

SECRETARY OF LABOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

STUART C. MARKMAN
KYNES, MARKMAN & FELMAN, P.A.
Post Office Box 3396
Tampa, FL 33601
Phone: (813) 229-1118

MICHAEL S. FINCH
1401 61st Street South
Gulfport, FL 33704
Phone: (727) 562-7862

GEORGE E. SPOFFORD, IV
Counsel of Record
AARON W. PROULX
GLENN RASMUSSEN FOGARTY & HOOKER, P.A.
Post Office Box 3333
Tampa, FL 33601
Phone: (813) 229-3333

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONER'S REPLY BRIEF

The Secretary concedes there is a circuit split on the issue of whether a supervisor's knowledge of his own misconduct is imputed to the employer as a matter of law. Res. 12, n.4. In fact, the Secretary concedes that she has sought review of that very issue, and acknowledges its importance. Res. 12-13. The Secretary nevertheless opposes review on the ground that this case is not suitable for resolving the important conflict it presents.

In truth, this is an ideal case for resolving the circuit split over the issue of imputation of supervisory misconduct. The Petitioner/employer has been punished based on the actions of two supervisors. The supervisors had spotless safety records. No similar violations had previously occurred at any of the employer's work projects. Had the supervisors followed the employer's safety rules, there would have been no loss of life. Pet. App. 9, 14, 17-23. Yet despite Congress' intention to create a fault-based rather than strict liability scheme under the Act, the Eleventh Circuit held the supervisors' knowledge of their misconduct is imputed to Petitioner without regard to the foreseeability of that misconduct. If there are any limits to the Secretary's ability to impute a supervisor's knowledge of his own misconduct to an employer, this is the case to announce those limits.

A. Petitioner presented the issue of imputed supervisory knowledge at all stages, and the issue is preserved for review.

The Secretary argues that Petitioner failed to convey to the Commission the "crux" of the issue on review. Res. 15. In particular, the Secretary contends that Petitioner did not argue that the Act prohibits knowledge imputation in supervisory misconduct cases. Res. 14. The Secretary's preservation argument is mistaken. It is based on an incomplete recitation of what Petitioner actually argued in the Commission.

The Secretary states that Petitioner "acknowledged" that a supervisor's knowledge can be imputed to the employer to provide a violation of the Act. Res. 14-15. But the Secretary fails to quote the entire argument Petitioner made in the Petition for Discretionary Review ("PDR") that it filed with the Commission, which states:

> First, as a matter of law, Complainant has the burden of proving that JCI had actual or constructive knowledge of the unsafe trench. When a supervisory employee has actual or constructive knowledge of the violative condition, the knowledge of that employee can be imputed to the employer. However, the employer can rebut that imputed knowledge by showing that the employer "took reasonable measures to prevent the occurrence of the violation." *Where the employer undertook reasonable efforts to prevent the violation, the knowledge of a supervisor engaged in misconduct is not attributable to the employer,*

> *because to do so creates an absolute liability situation that is not intended by the Act.*

Supp. C.A. R.E. tab 8 at 3-4 (emphasis added) (citations omitted).

Petitioner's full argument is perfectly consistent with the point Petitioner makes here – that the Secretary cannot establish a violation of the Act by imputing a supervisor's knowledge of his own misconduct when the employer could not foresee that violation.[1] As the above-quoted passage points out, if a fault-based foreseeability rule is not imposed and the Secretary's knowledge imputation approach is followed, the result is "an absolute liability situation that is not intended by the Act." Supp. C.A. R.E. tab 8 at 3-4.[2]

The Secretary also contends Petitioner "did not argue" that imputation of supervisory knowledge "impermissibly shifts the burden of proof." Res. 14. The Secretary is incorrect. Petitioner's argument that knowledge imputation "creates [] absolute liability," Supp. C.A. R.E. tab 8 at 3, undeniably encompasses

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[1] In support of that argument, Petitioner's PDR cited *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564 (5th Cir. 1976), the same circuit court opinion upon which Petitioner primarily relied in the Eleventh Circuit.

[2] Petitioner's PDR addressed foreseeability and the unpreventable employee misconduct defense in two separate sections. Supp. C.A. R.E. tab 8 at Part II and Part IV. The above-quoted excerpt comes from the section that addressed the requirement of foreseeability in the Secretary's prima facie case.

the argument that knowledge imputation shifts the burden of proof – if it does not eliminate the foreseeability element in its entirety. However phrased, the point is the same: When a rogue supervisor's intentional violation of the employer's own safety rules is imputed to the employer, the employer loses the ability to defend itself. Such imputation violates Congress' intention of creating a fault-based rather than strict liability system.

A point is presented for review by the Commission if "called to the attention of the Commission." *P. Gioioso & Sons, Inc. v. OSHRC*, 737 F.3d 100, 105 (1st Cir. 1997); *see also Cleveland Consolidated, Inc. v. OSHRC,* 649 F.2d 1160, 1164-65 (5th Cir. 1981). Petitioner preserved the issue of whether a supervisor's knowledge of his own misconduct is imputed to the employer as a matter of law.

B. Had the Eleventh Circuit applied the better reasoned majority rule, Petitioner would have prevailed.

As the Petition shows, imputing supervisory knowledge relieves the Secretary of its burden of proof. Pet. 11-12. The Secretary argues that the elimination of its burden does not matter. According to the Secretary, "the outcome of the proceeding would have been the same even if the ALJ had required the Secretary to demonstrate that the violation . . . was foreseeable." Res. 19. That is so, the Secretary's argument runs, because the elements of

the affirmative defense of "unpreventable employee misconduct" closely mirror the foreseeability analysis of the prima facie case, and the ALJ found that Petitioner failed to establish that defense. Res. 17-19.

The Secretary again is in error. It made the same losing argument in *W.G. Yates & Sons Constr. Co., Inc. v. OSHRC*, 459 F.3d 604, 610 (5th Cir. 2006) (Reavley, C.J., dissenting). The ALJ's rejection of the unpreventable employee misconduct defense does *not* conclusively establish foreseeability. If the evidence shows the employer "could not with the exercise of *reasonable diligence* [] know of the presence of the violation," then the Secretary has failed to establish the knowledge element of her prima facie case. 29 U.S.C. § 666(k) (emphasis added). Violations of an employer's safety program are not rendered foreseeable "simply because the employer does not have a work rule that tracks the Secretary's interpretation of the governing regulation." *Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 358 (3d Cir. 1984). Rather, under Congress' balanced approach and the majority rule, safety programs are "broadly construed," to determine whether the employer has been reasonably diligent. *Id.*; *see also* 29 U.S.C. § 666(k). Even the Commission has "cautioned the Secretary not to 'overemphasize the formal aspects of [a company's] safety program and fail to give proper significance to its substance.'" *Id.* (quoting *Sec'y of Labor v. Jones & Laughlin Steel Corp.*, 10 O.S.H.C. Cas.

(BNA) 1778, 1782 (June 25, 1982).[3] Thus, in the circuits that follow the Act and the majority rule, reasonable diligence will defeat the Secretary's prima facie case. The perfect compliance the Secretary demands is not required. Nor should it be.

In short, "the employer has a far greater chance of prevailing if the Commission analyzes the same facts under the" foreseeability element of the Secretary's prima facie case rather than the employer's unpreventable employee misconduct affirmative defense. Kenneth D. Kleinman and John F. Ward, *The Intersection of Employer and Employee Responsibility: The Burdens of Showing Employer Knowledge and Employee Misconduct*, 7 U. Pa. J. Lab. & Emp. L. 487, 509-10 (2005). *See also id.* at 493-509, n.174. In this case, the ALJ relieved the Secretary of its burden of

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[3] The ALJ acknowledged that Petitioner's "safety manual contains detailed sections" on Petitioner's "Trench Safety Policy," and that "[t]he Secretary stipulated that this safety policy manual was generally adequate as it related to trench safety." Pet. App. 30-31. On remand, the ALJ should be prohibited from again relying on hypertechnical differences between Petitioner's work rules and the Secretary's interpretation of OSHA standards as a basis for establishing foreseeability of the supervisors' misconduct. The slight differences between Petitioner's rules and the Secretary's interpretation of OSHA standards were unrelated to the real cause of the employees' injuries, which was the supervisors' unforeseeable and total disregard of the company's trench safety policy. In other words, the accident in this case was not the result of Petitioner providing a 34-degree slope for the trench instead of a 45-degree slope. Pet. App. 35. It was the result of the supervisors' decision to violate Petitioner's trench safety policy by omitting *all* sloping. Pet. App. 21-23.

proving foreseeability and imposed on Petitioner the burden of proving the affirmative defense. When it did so, the ALJ determined that the adequacy of Petitioner's safety program would be evaluated on a hypertechnical basis, not under the reasonable and broad construction the law requires. The upshot is that the ALJ's failure to address the critical issue of foreseeability in the context of the Secretary's prima facie case before shifting to Petitioner the burden to prove the affirmative defense is harmful error. *See W.G. Yates,* 459 F.3d at 609-10 (remanding so the ALJ could conduct the foreseeability analysis of the prima facie case, even though the ALJ already determined that the employer failed to establish the affirmative defense).[4]

C. The Eleventh Circuit's opinion supplies a rule of decision that the Supreme Court should review and correct.

Without citation of authority, the Secretary argues that the Eleventh Circuit opinion should not be reviewed because it is unpublished. Res. 15-17. The Secretary is wrong. This Court recognizes the prospective effect of unpublished opinions, and has reviewed them. *See, e.g., Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147 (1984) (summarily reversing the Eleventh Circuit's unpublished opinion in

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[4] The ALJ in the present case is the same ALJ that presided over *W.G. Yates*. Pet. 4 n.1, 19.

Brown v. Baldwin County Welcome Ctr., 698 F.2d 1236 (11th Cir. 1983 – Table of Decisions without Reported Opinions)). As Justice Blackmun explained,

> The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion *may have a lingering effect in the Circuit* and surely is as important to the parties as is a published opinion.

Smith v. U.S., 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., dissenting) (emphasis added).

Left uncorrected, the decision in this case will undeniably have a "lingering effect." Unpublished opinions are persuasive authority in the Eleventh Circuit. *See* 11th Cir. Rule 36-2; *Lanier Constr., Inc. v. Carbone Props. of Mobile, LLC*, 2007 WL 3307384, *3, n.5 (11th Cir. 2007) (vacating and remanding based on an unpublished opinion). Under Rule 32.1 of the Federal Rules of Appellate Procedure, courts may no longer restrict the citation of unpublished opinions that are issued on or after January 1, 2007. *See* Fed. R. App. P. 32.1. The opinion in this case was issued on May 14, 2007. Additionally, unpublished opinions are now widely accessible on court websites and through commercial services like Westlaw and LexisNexis. *See* Anika C. Stucky, *Building Law Not Libraries: The Value of Unpublished Opinions and Their Effect on Precedent*, 59 Okla. L. Rev. 403, 406 (2006).

The decision on review is only the second to adopt the Secretary's position. There is no reason to believe the Secretary will not rely on the Eleventh Circuit's unpublished decision in her continuing efforts to advance her knowledge imputation argument.

The Secretary also asserts that the Eleventh Circuit opinion should not be reviewed because it does not really conflict with the majority rule in that the Eleventh Circuit did not specifically hold that the ALJ's legal analysis was correct. Res. 15-17. That argument is unavailing. The Eleventh Circuit opinion states that the ALJ correctly understood the law it was applying:

> The ALJ *imputed* Jacobs' actual knowledge of the violation to JCI. . . . The ALJ also . . . held that [Petitioner] '*through Cox and Jacobs*, was actually aware, at the time of the violative act, that the act was unlawful.'
>
> . . . .
>
> [T]he decision is in accordance with the law.

Pet. App. 4, 5 (emphasis added).

The Secretary asserts that "it is possible" the Eleventh Circuit rested its opinion on either the Secretary's forfeiture argument or its harmless error argument. Res. 16-17. But the parties expressly argued both points in the Eleventh Circuit, *see* Gov't C.A. Br. 33-39, 45-47; Pet. C.A. Reply 3-7, 13-15, and the Eleventh Circuit mentioned neither. Rather, the

Eleventh Circuit approved the ALJ's legal analysis and in doing so adopted the minority rule of law.

D. The ALJ's analysis violates Congressional intent and is unreasonable and incorrect.

The Secretary's final argument, like the decisions of the ALJ and the Eleventh Circuit, is in conflict with Congressional intent. Contrary to the Secretary's characterization, the question on review is *not* "which of petitioner's agents are sufficiently identified with petitioner such that their actions and knowledge are properly attributable to the corporation." Res. 19. Rather, the important issue on review is whether the conduct of the employer's supervisors was sufficiently foreseeable under the Act to support a finding that the employer *knowingly* violated an OSHA standard. The Secretary argues that the employees' status as supervisors, *standing alone*, justifies attributing their knowledge to the employer. The fundamental flaw in that position – which is the minority view – is that it is rooted in general principles under agency common law rather than the Act's fault-based requirement of foreseeability.[5] Pet. 14.

The rationale the Secretary offers for the minority rule cannot withstand scrutiny either. According

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[5] Evidently, in an effort to imply that Petitioner had knowledge, the Secretary repeatedly states that Petitioner's "top management" was aware that the gas line existed. Res. 4-5, 8, 11, 18-19. Yet, there is no evidence that Petitioner's management ever was made aware of the violation itself, or that it should have been.

to the Secretary, "holding employers responsible for the knowingly wrongful acts of their supervisory employees . . . would actually provide the appropriate incentives to hire supervisors who will not engage in knowing misconduct in the first place." Res. 20. The facts of this case belie the Secretary's claim. The supervisors in this case were experienced trench workers who had spotless safety records. *See* Pet. C.A. Br. 14-15. Imputing knowledge of their willful misconduct to Petitioner without determining that their actions were foreseeable will not encourage employers to exercise more caution. Instead, it will communicate to them that corporate care and prudence do not matter.

CONCLUSION

The issue on review is of great importance. The Court should grant Certiorari and resolve the split in the circuits.

Respectfully submitted,

STUART C. MARKMAN
KYNES, MARKMAN & FELMAN, P.A.
Post Office Box 3396
Tampa, FL 33601
Phone: (813) 229-1118

MICHAEL S. FINCH
1401 61st Street South
Gulfport, FL 33704
Phone: (727) 562-7862

GEORGE E. SPOFFORD, IV
Counsel of Record
AARON W. PROULX
GLENN RASMUSSEN FOGARTY & HOOKER, P.A.
Post Office Box 3333
Tampa, FL 33601
Phone: (813) 229-3333

Attorneys for Petitioner

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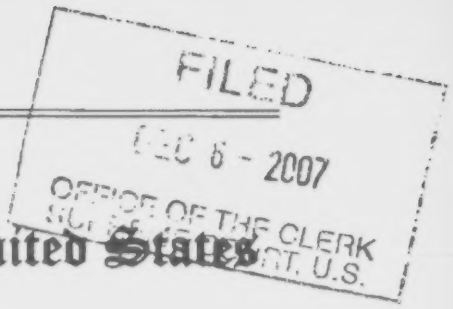

In The
Supreme Court of the United States

JOHN CARLO, INC.,

Petitioner,

v.

SECRETARY OF LABOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF STEEL ERECTORS ASSOCIATION OF AMERICA, INC., UNDERGROUND UTILITY CONTRACTORS OF FLORIDA, INC., AND FLORIDA A.G.C. COUNCIL, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MATTHEW C. LUCAS
Counsel of Record
BRICKLEMYER SMOLKER & BOLVES, P.A.
500 E. Kennedy Blvd., Ste. 200
Tampa, FL 33602
Phone: (813) 223-3888

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225 6964
OR CALL COLLECT (402) 342 2831

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INTEREST OF THE *AMICI CURIAE*

Amici curiae, Steel Erectors Association of America, Inc. ("SEAA"), Underground Utility Contractors of Florida, Inc. ("UUCF") and Florida A.G.C. Council, Inc. ("FAGC"), respectfully submit this brief in support of petitioner, John Carlo, Inc. ("JCI"),[1] and urge the Court to reverse the decision of the United States Court of Appeals for the Eleventh Circuit, a decision that expands a decade-long rift among the circuits regarding the proof required to demonstrate an employer's serious or willful violation of the Occupational Safety and Health Act of 1970 ("OSH Act" or the "Act"), 29 U.S.C. §§ 651, *et seq.*

SEAA is the oldest and largest trade association representing structural steel erectors in the United States. SEAA has nearly five hundred contractor and

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[1] Pursuant to Rule 37.2(a) of the Rules of the Supreme Court of the United States, *amici curiae* have timely provided notice of their intent to file this brief in support of Petitioner to counsel for Petitioner and Respondent. Counsel for both Petitioner and Respondent have furnished their written consent to the filing of this brief. *Amici curiae* further represent, pursuant to this Court's Rule 37.6, that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* have made a monetary contribution to the preparation and submission of this brief. In this brief, the Respondent shall be referred to as the "Secretary," and the Occupational Safety and Health Review Commission shall be referred to as the "Commission." The Occupational Safety and Health Administration shall be referred to as "OSHA." References to the appendix of Petitioner's brief shall be referred to as "App. [page number]."

associate members performing work throughout the country. SEAA provided members and representatives to the Department of Labor's Steel Erection Negotiated Rulemaking Advisory Committee, which, in 2002, resulted in the adoption of the first OSH Act standard to arise from direct negotiations with a regulated industry. UUCF is a non-profit trade association representing over six hundred contractors and suppliers engaged in the business of building and repairing underground utilities throughout the State of Florida. FAGC is an organization comprised of three Florida chapters of the Associated General Contractors of America, the preeminent nationwide trade association for construction contractors. FAGC represents over five hundred members and general contractors conducting construction work throughout Florida.

REASONS FOR GRANTING THE WRIT

The precise dispute for which review is sought is perhaps best understood by first resolving what it is not. When framed properly, the issue would not, as has been suggested by the Secretary to the Eleventh Circuit, concern a company's "responsibility" for the intentional acts of a foreman, which led to the tragic death of his fellow employee. The common law of tort, the statutory remedies of worker's compensation statutes, and, when appropriate, criminal penalties all provide ample means of obtaining individual and societal redress against a company, to ensure an

employer bears its appropriate responsibility for injuries. Rather, the issue Petitioner and *amici curiae* request this Court to consider is whether an employee supervisor who disregards his training, his authority, and indeed, his express instructions from his employer, can be said to create a company-sanctioned safety hazard. To what extent can the doctrine of *respondeat superior* be invoked against an employer in a regulatory proceeding where the supervisor acts contrary to his instructions? Are the goals of the OSH Act in any way advanced by instantaneously imputing knowledge from a "rogue" foreman in the field to his entire company miles away? As will be shown below, they are actually undermined.

I. The OSH Act's goals and the duties it imposes were meant to be realistic and achievable.

Congress struck a careful balance when it enacted the OSH Act. Recognizing the inherent distinction between employers and employees in the endeavor to create safer workplaces, Congress found that their respective responsibilities were indeed "separate" ones. 29 U.S.C. § 651(b)(2). Thus, "[i]t was not the legislative purpose to impose absolute liability on employers for safety violations, [] or to require safety measures beyond those that are reasonable and feasible." *New York State Elec. & Gas Corp. v. Sec. of Labor*, 88 F.3d 98, 103 (2d Cir. 1996) (internal citations omitted). Although the Act certainly could have been structured to make clear that any violation, in any

circumstance, constituted a punishable infraction, Congress limited an employer's duty under the Act to be an "achievable" one, to require "elimination only of preventable hazards." *W.G. Yates & Sons Construction Co., Inc. v. OSHRC*, 459 F.3d 604, 606 (5th Cir. 2006). In this balance of fostering safer worksites through reasonable, achievable, realistic goals, Congress (and the majority of courts interpreting the Act) recognized the impossibility of ensuring perfect employee compliance with OSH Act safety regulations through regulatory sanctions.

The case *sub judice* poses the important issue of whether it is a reasonable or achievable goal for every employer to know what every foreman or supervisor perceives on every work site at any given moment, and to then somehow ensure that every such foreman and supervisor will indeed follow every safety instruction they have ever been given. By instantaneously imputing a foreman's knowledge of his own, willful wrongdoing to his employer, the Secretary has now placed upon employers this very goal. *Amici curiae* submit this is an impossible standard to achieve. The legal mechanism through which the Secretary has imposed this burden – the theory of "agency" or *respondeat superior* – has been both misdirected and misapplied to the detriment of employers in the construction industry.

II. At present, the imputation of a foreman's knowledge of a hazardous condition he creates will fundamentally shift the burden of proof for OSH Act violations in a minority of circuits.

To prove that an employer has violated an OSH Act standard or regulation, the Secretary must prove each of the following four elements: (1) the standard is applicable; (2) the employer failed to comply with the standard; (3) employees had access to the violative condition; and, most importantly in this case (4) that the employer had knowledge or constructive knowledge of the violative condition. *New York State Elec. & Gas*, 88 F.3d at 105. Although knowledge can be proven in a variety of ways, the Secretary bears the ultimate burden of proving this "fundamental" element of its case by a preponderance of the evidence. 5 U.S.C. § 556(3); *Trinity Industries, Inc. v. OSHRC*, 206 F.3d 539, 542 (5th Cir. 2000).

The present case concerns the repercussions of one particular vista of knowledge: the knowledge of a company's supervisors. The Secretary contends that the knowledge of a supervisor or foreperson in the field concerning a safety hazard he or she creates instantly becomes the "knowledge" of the entire company, thus discharging her initial burden of proving the fourth element of an OSH Act violation. Apparently harkening to agency principles, the Sixth Circuit has adopted this reasoning, albeit without substantial explanation of why it did so. *See Danis-Shook Joint Venture XXV v. Sec. of Labor*, 319 F.3d

805, 812 (6th Cir. 2003) ("Because Wagner was a foreman and knew of his own failure to wear personal protective equipment, this failure may be imputed to Danis-Shook."). Thus, in cases where a rogue supervisor ignores explicit safety instructions from his employer, the Secretary's burden of proving her *prima facie* case of a violation becomes a foregone conclusion. The first three elements will be established by the occurrence of the event. The final element of the Secretary's case, the employer's knowledge, will likewise be relegated to a self-proven analytical exercise simply by engaging in the legal fiction of *respondeat superior*: the moment the recalcitrant supervisor perceives his own hazard, he binds his employer to the very conduct his employer attempted to prevent.

There can be no doubt that the Eleventh Circuit adopted the same principle in the case *sub judice*. Although no evidence was presented regarding Petitioner's management's awareness of the twenty to thirty minute trench hazard that led to a worker's death, the Commission affirmed a "serious" and "willful" violation of 29 C.F.R. § 1926.652(a)(1) on the part of JCI, finding that JCI "[t]hrough Cox [a supervisor] and Jacobs [a foreman], was actually aware, at the time of the violative act, that the act was unlawful." App. 29. The Eleventh Circuit then, in turn, affirmed this legal fiat: "The ALJ imputed Jacobs' actual knowledge of the violation to JCI." App. 4.

These decisions represent an expansion in the scope of punishable conduct under the OSH Act far beyond what was authorized by Congress. Taken

together, the Secretary has effectively crafted precedent that shifts the burden of proof entirely from the regulating agency to the regulated employer any time an employee "foreman" knowingly engages in unsafe conduct. Those in the business of construction are left to prove their innocence from a presumption of guilt whenever their field supervisors engage in dangerous activities.

The Secretary argued below that an employer can nevertheless avail itself of protection from a supervisor's misconduct by asserting the employee's misconduct as an affirmative defense.[2] Completely shifting the burden of proof from the regulating agency to the regulated employer without legislative amendment, substantive justification (or, indeed, any explanation) is troubling enough for a regulatory statute that carries the potential for substantial fines and even imprisonment.[3] It is all the more so where,

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[2] The employee misconduct defense requires the employer to prove the following elements: (1) establishment of work rules designed to prevent the violation; (2) adequate communication of those rules to employees; (3) that the employer has taken steps to discover violations; and (4) the employer has effectively enforced the rules when violations have been discovered. *W.G. Yates & Sons Const. Co. Inc. v. OSHRC*, 459 F.3d 604, 609 n.7 (5th Cir. 2006); *Frank Lill & Son, Inc. v. Sec. of Labor*, 362 F.3d 840, 845 (D.C. Cir. 2004).

[3] 29 U.S.C. § 666(e) ("Any employer who willfully violates any standard, rule, or order . . . or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not

(Continued on following page)

as in the Sixth and Eleventh Circuits, the "defense" is rendered illusory by applying the doctrine of *respondeat superior*. If a foreman employee willfully creates a hazard and his knowledge of the hazard he creates is instantaneously attributed to his employer, the employer is trapped in a "Catch-22" in the Sixth and Eleventh Circuits: the very same employee misconduct it must disavow itself of in order to prove effective enforcement of its safety rules will be treated as irrefutable evidence of the employer's failed enforcement. Simply put, the defense can never be established.

In contrast, the Third, Fourth, Fifth, and Tenth Circuits correctly limit a foreman's perception of his own unsafe conduct to an item of evidence, something to be considered in the broader context of the employer's safety program. *W.G. Yates & Sons Const. Co. Inc. v. OSHRC*, 459 F.3d 604, 608-609 (5th Cir. 2006); *L.R. Wilson and Sons, Inc. v. OSHRC*, 134 F.3d 1235, 1240 (4th Cir. 1998); *Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 357 (3d Cir. 1982); *Mountain States Telephone and Telegraph Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980). Thus, a foreman's perception of a hazard he creates, by itself, does not discharge the knowledge element of the Secretary's *prima facie* case:

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more than $10,000 or by imprisonment for not more than six months, or by both.").

> [a] supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable. As with each element required to establish a violation, employer knowledge must be established by the Secretary. . . . Consequently, the Secretary, not Yates [the employer], bears the burden to establish that the supervisor's conduct was foreseeable.

W.G. Yates, 459 F.3d at 608-609 (internal citations omitted).

Only after the Secretary has actually discharged her burden of persuasion on all of the elements of a violation would the employer need to establish an employee misconduct defense to avoid sanctions. For to hold otherwise would impose a burden on the employer "of defending a violation that had not been established." *Id.* at 609. This view represents a far more reasoned and pragmatic approach to furthering the Act's goals, while protecting employers from conduct they could never reasonably be expected to prevent. These courts, like Congress when it enacted the OSH Act, recognize that an employer cannot exert complete control over every action of an employee in the field. As such, it is wholly unreasonable to charge employers with their employees' knowledge when their employees disregard their express instructions.

III. This Court should review the Sixth and Eleventh Circuits' improper application of agency principles to OSH Act violations.

A. Applying *respondeat superior* liability to employers contravenes the OSH Act's definition of "employer."

It must be noted at the outset that the Eleventh and Sixth Circuits' ascription of OSH Act liability through the subjective perceptions of an employer's agents finds no support in the text of the Act itself. Quite the contrary, the Act defines an "employer" to mean: "[a] person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State." 29 U.S.C. § 652. Notably absent from this definition is any mention of the "person's" agents. This omission cannot be construed as an unintentional oversight. When it deems appropriate to extend the ambit of a statute to include one's agents, Congress has made that intention perfectly clear in other regulatory statutes. *See* 42 U.S.C. § 2000(e)(b) (Title VII definition of "employer" includes "a person engaged in an industry affecting commerce . . . and any agent of such a person . . . "); 42 U.S.C. § 12111(5)(A) (definition of "employer" under Americans with Disability Act includes "any agent"); 29 U.S.C. § 630(b) (under Age Discrimination in Employment Act, "The term [employer] also means (1) any agent of such a person . . . ").

Of course, neither the *Danis-Shook* nor the *JCI* courts premised their imputation of a supervisor's knowledge upon explicit language from the Act. Assuming, as one must, that the basis was gleaned from the common law, there as well, the Courts' engrafting of agency principles was fundamentally flawed – particularly in the construction industry.

B. The blind application of *respondeat superior* to OSH Act violations sets an impossible standard with which employers would have to comply.

The touchstone of the Sixth and Eleventh Circuit's holdings appear to rest upon the assumption that in common law, an employer is liable for the acts of its employees. While true in its proper context, the incursion of *respondeat superior* into OSH Act regulatory jurisprudence is far from a seamless fit. The primary purpose underlying *respondeat superior* liability was to ensure that tort victims injured by a corporation's employee had an adequate means of obtaining compensation from a party that could actually pay a judgment. *See O'Hara v. Teamsters Union Local No. 856*, 151 F.3d 1152, 1158 (9th Cir. 1999). While the OSH Act contains an exhaustive list of the goals it seeks to advance, restitution for tort victims is not among them. 29 U.S.C. § 651(b)(2). Nor would such a goal even be appropriate for a statute such as the Act. *Cf. Faragher v. City of Boca Raton*, 524 U.S. 775, 805-806 (1998) (noting the "primary objective" of Title VII, "like that of any statute meant

to influence primary conduct, is not to provide redress but to avoid harm.").

When framed in its regulatory context, the automatic attribution of knowledge from foreman to employer becomes especially problematic in the construction industry. The experience of *amici curiae* is that construction employees frequently rely upon informal directions from their senior co-workers, journeymen, or tradesmen in performing their respective job duties, none of whom may carry any actual supervisory authority from the employer. Often, more experienced laborers simply take upon themselves the task of guiding novice workers without necessarily informing a designated supervisor or manager. Even among authorized supervisor employees, the degree of supervision and oversight with which they are actually entrusted may vary tremendously between projects and job sites.

Whatever distinction may lie between a "supervisor," a "foreman," or workers and laborers of varying degrees of seniority, it is a distinction that is, at best, blurred. The Commission's own precedent recognizes as much – but utilizes this less than clear distinction to expand, rather than restrict, regulatory liability. *E.g., Sec. of Labor v. Rawson Contractors, Inc.*, 2000 O.S.H.D. (CCH) P 32096, *8 (O.S.H.R.C.A.L.J. 2000) (union member foreman with no authority to hire or fire workers imputed knowledge of hazardous trench to management of employer); *Sec. of Labor v. Propellex Corp.*, 1999 O.S.H.D. (CCH) P 31792, *3 (O.S.H.R.C. 1999) (knowledge of dangerous fire near explosive

materials imputed to company through a crew "lead-person" with no authority to discipline, hire, or fire employees, but who earned $1.00 more per hour than her fellow employees); *Sec. of Labor v. A.P. O'Horo Co., Inc.*, 1991 O.S.H.D. (CCH) P 29223 (O.S.H.R.C. 1991) (laborer designated as temporary crew foreman imputed knowledge to employer of unsafe trench); *Sec. of Labor v. Paul Betty d/b/a Betty Brothers*, 1981 O.S.H.D. (CCH) P 25219 (O.S.H.R.C. 1981) (plasterer who merely stated he was the "foreman" of a single laborer working without a scaffold charged his employer with knowledge of the violation). One is left to wonder what remains of the employer's chosen designation of supervisory employees if the Commission construes any and every veneer of authority to create supervisor "agents" from ordinary workers.[4] This expansion of supervisory-based liability is illustrated in the case at bar: the foreman and project superintendent through whom the Commission purportedly imputed knowledge of the unsafe trench to JCI were two individuals among over a thousand JCI employees, who

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[4] It should also be noted that the Sixth and Eleventh Circuits, while acknowledging the supervisory status of the employee agent(s), did not limit their application of *respondeat superior* correspondingly. If a supervisor's knowledge of a hazardous condition is properly imputed to his employer simply because the supervisor is "an agent" of that employer, then it would stand to reason that every employee's knowledge could likewise be imputed under precisely the same analysis. Such an application could not be described as anything other than strict liability for an employer.

were themselves subordinate to JCI's general superintendent. App. 40, 42.

Even beyond the instance of the rogue supervisor circumventing his express directions, this expansion of agent-based liability creates confusion for construction employers who happen to do business in multiple jurisdictions. *Amicus curiae* SEAA has experienced varying and shifting interpretations of safety standards by OSHA depending on the location of a worksite and the compliance officer assigned to a particular geographic area. Under these circumstances, the perception a supervisor could impute to his or her employer would turn on whether a condition constituted a hazard in one jurisdiction, but not necessarily another. In effect, the employer's "knowledge" of a condition on any given site would become the function of a regulatory officer's interpretation of that condition.

Most troubling of all, however, are the legal repercussions the Sixth and Eleventh Circuits' analyses necessarily create. Read closely, the Eleventh Circuit's affirmance in this case, the Sixth Circuit's holding in *Danis-Shook*, and the Commission's holdings for the past two decades not only fail to account for the pragmatic realities of construction work, they have stretched the concept of "constructive knowledge" of a corporation – a standard akin to negligence – squarely into the realm of absolute, strict liability. Under these rulings and the Commission's own precedent, any worker who directs a fellow employee to move a pile of bricks, nail a board, or dig a hole – or

simply happens to earn more money than his co-worker – instantly becomes the "agent" of the employer's entire safety program. What these authorities illustrate is that employers can have the efficacy of their safety programs adjudicated (and correspondingly sanctioned) based upon nothing more than the *apparent* authority of any one of their employees on a worksite.[5] In so doing, two circuit courts have amalgamated a "strict liability" agency principle into a regulatory act that purposely avoided strict liability as a standard of duty.

The Seventh Circuit explored just such a conflation in a Title IX claim in *Smith v. Metropolitan School District Perry Township*, 128 F.3d 1014 (7th Cir. 1997). In *Smith*, a former student sought to hold her school board and district liable for the sexual harassment of her high school swim team's coach. *Id.* at 1017-1018, 1021. One of the plaintiff's theories of liability hinged upon the notion that the coach was the agent of the institutional defendants. *Id.* at 1022. A divided appellate court remanded the case for entry of summary judgment in favor of the defendants, and, in so holding, offered this cogent analysis:

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[5] *Cf.* RESTATEMENT (THIRD) OF THE LAW ON AGENCY § 2.03 (2006): "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."

> Agency principles define the relationship between principals and their agents, as well establish rules for a principal's liability to third parties. Some of those rules create strict liability, and others create liability only for negligence. In fact, the dissent itself applies some agency principles (abuse of authority and apparent authority) which create strict liability. Thus, the choice presented is not between agency principles and strict liability, but between different agency principles, some of which result in strict liability and some of which result in liability only for negligence . . . Title IX cannot create strict liability for grant recipients [ ] . Yet certain agency applications would do just that.

Id. at 1026 n. 12.

What the Seventh Circuit recognized explicitly in *Smith* is precisely what has arisen implicitly within the Sixth and Eleventh Circuits for OSH Act violations: employers are held to strict liability for violations through the apparent authority of any "supervisor" they employ. This is truly strict liability in effect, if not in name. *Cf. New York State Elec. & Gas*, 88 F.3d at 101 ("[a]lthough the Commission's ruling did not in so many words impose absolute liability on the employer, it implicitly applied a *per se* rule of liability based on a single occurrence of unsafe conduct . . . ").

Similarly, in a Sherman Act case, Justice Rehnquist decried the expansion of corporate liability

based upon nothing more than a director's apparent authority:

> Finally, no principle of agency law was more firmly established in 1890 – or now for that matter – than that *punitive* damages are not awarded against a principal for the acts of an agent acting only with apparent authority and without any intention of benefiting the principal . . . Although an inquiry into the legislative history and the law of agency is not conclusive, it does cast serious doubt on the Court's choice of this case to promulgate a new rule of antitrust liability.

See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 589 (1982) (*dissenting*).

This case presents this Court the opportunity to correct the contours of agency liability being applied under the OSH Act, to align the text of the Act and the Secretary's burden of proof with settled jurisprudence on the law of *respondeat superior*. There are also policy implications the Court should consider as well.

C. Expanding an employer's OSH Act liability through every field supervisor and foreman it employs could undermine incentives to utilize supervisors.

The Eleventh and Sixth Circuits' holdings contravene long-standing precedent as well as the goals

the OSH Act was enacted to achieve. They also impose an impossible dilemma on contractors: construction employers must staff a level of supervision to ensure safety on their jobsites; yet, the more supervisors they employ, the greater likelihood that any hazardous condition that temporarily exists will be instantly imputed to them, thereby undercutting the Commission's view of the employer's safety record. The case before the Court illustrates this point: the hazardous trench that precipitated the accident existed for all of twenty to thirty minutes. App. 13.

Instantaneous and automatic imputation of every supervisor's misconduct to his employer will hardly generate an incentive on the part of employers to employ more supervisors. Indeed, so long as there is no demonstrable detriment to the employer's safety program, an employer may field fewer employees with supervisory roles in order to limit its potential exposure under the Act. The application of a strict liability form of agency unavoidably creates incentives such as these that could actually deter the employment of foremen and supervisors on construction worksites.

IV. This case would serve as an appropriate vehicle for the resolution of this conflict.

Judge Cardamone of the Second Circuit presciently opined in 1996 that switching the burden of proof to the employer in employee misconduct cases was "sowing seeds of doubt in a field of the law that

may already be described as a patchwork of confusion." *New York State Elec. & Gas*, 88 F.3d at 100-101. *Amici curiae* respectfully suggest the patchwork has grown only more confused in the ensuing decade following *New York State Electric*. This case poses an ideal opportunity for this Court to resolve this confusion.

The Eleventh Circuit's decision not to publish the *JCI* opinion in the instant case clearly suggests its view that imputation of a supervisor's knowledge (and shifting the burden of proof from the Secretary to an employer) is presumptively self-evident. The appellate court is not likely to retreat from this incorrect presumption absent this Court's intervention. However, a well-developed record below, coupled with the clear and succinct expression of the Eleventh Circuit's theory of agency, crystallizes the unsettled legal question for the Court to decide. The question presented to this Court raises an important and timely issue not only for the litigants, but also for all those engaged in the construction industry throughout the United States. This case is an ideal vehicle to finally resolve all of these considerations.

CONCLUSION

None of the circuit courts applying a supervisor's knowledge to his or her employer have yet engaged in a substantive analysis as to the justification for doing so. Even now, this anomaly of shifting the burden of

proof – and all of its repercussions – has yet to be rationalized by any circuit court to adopt it, beyond a rote recitation to basic principles of agency law. When explored more carefully, the principles the Sixth and Eleventh Circuit invoked turn the Act (and its settled precedent) into a strict liability regime. For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

MATTHEW C. LUCAS
Counsel of Record
BRICKLEMYER SMOLKER & BOLVES, P.A.
500 E. Kennedy Blvd., Ste. 200
Tampa, FL 33602
Telephone: (813) 223-3888
Counsel for Amici Curiae